NO FORMAL JURISDICTIONAL STATEMENT WAS FILED IN THIS CASE. INSTEAD, THE APPLICATION FOR A STAY OF THE JUDGMENT OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK WAS TREATED BY THE COURT AS A JURISDICTIONAL STATEMENT AND PROBABLE JURISDICTION WAS NOTED.

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 28 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

—*vs.*—

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

—*vs.*—

NEW YORK CITY HEALTH AND HOSPITALS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPLICATION FOR A STAY FILED FEBRUARY 11, 1980
PROBABLE JURISDICTION NOTED FEBRUARY 19, 1980

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

—*vs.*—

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Appellant

—*vs.*—

NEW YORK CITY HEALTH AND HOSPITALS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

INDEX

	Page
Docket entries	1
Verified Complaint (Class Action)	31
Exhibit A, Cong. Rec. H 10126 (daily ed., September 15, 1976)	45
Verified Complaint	47
Plaintiff's and Proposed Intervenors' Amended Complaint (Class Action)	58
Exhibit "A", HEW NEWS, Statement by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare dated August 4, 1977	82

Plaintiff's and Proposed Intervenors' Amended Complaint (Class Action)—Continued — Page

Exhibit "B", HEW NEWS, Statement by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare dated December 10, 1977 — 84

Judgment in *McRae* v. *Secretary of Health, Education and Welfare*, No. 76 C 1804 — 86

Judgment in *New York City Health and Hospitals Corp.* v. *Secretary of Health, Education and Welfare*, No. 76 C 1805 — 88

Stipulation — 90

Memorandum and Order — 92

Order Amending Complaint — 95

Order — 96

Affidavit of Johan W. Eliot, M.D., dated July 24, 1977 — 98

Affidavit of Mary Doe, dated July 29, 1977 — 105

Affidavit of Dr. David B. Bingham, dated July 29, 1977 — 107

Affidavit of Jane Doe, dated July 29, 1977 — 109

Affidavit of Dr. Jane E. Hodgson (Minnesota), dated July 29, 1977 — 111

Affidavit of Dr. Jane E. Hodgson (Connecticut), dated January 14, 1978 — 113

Application for Authorization with rejection indicated, dated December 21, 1977 — 116

Letter from Dr. Hodgson to To whom this may concern, dated October 7, 1977 — 117

Letter from Dr. James E. Brown to Dr. Hodgson, dated October 6, 1977 — 119

Letter from Dr. D. L. Conn to Dr. Harold R. Mundahl, dated June 1, 1976 — 120

Addendum to Affidavit of Dr. Hodgson (Connecticut), dated January 4, 1978 — 122

Affidavit of Susan Roe, not dated — 123

Affidavit of Ann Moe, dated January 4, 1978 — 125

Affidavit of Dr. Hodgson, dated February 2, 1978 — 127

Plaintiff-Intervenors Affidavit (Theressa Hoover), dated January 4, 1978 — 129

Plaintiff-Intervenors Affidavit (Ellen Kirby), dated January 4, 1978 — 134

Resolution On Abortion Rights of the Women's Division of the Board of Global Ministries, United Methodist Church — 138

Page

United Methodist Church Excerpts from resolution on Responsible Parenthood — 140

Attachment A, Number of Reported Medicaid Abortions, by State and Justification for Abortion, for which Federal Matching Funds should be Available under P.L. 95-205, October 1, 1978-December 31, 1978 — 141

Total Number of Reported Medicaid Abortions by State and Reporting Periods during 1978 — 143

Total Number of Reported Medicaid Abortions, by Justification for Abortion, February 14, 1978-December 3, 1978 — 145

Excerpts From Medical Transcripts:

Dr. Jane E. Hodgson — 146

Dr. Johan Eliot — 147

Dr. Edward O. Rothchild — 148

Dr. Christopher Tietze — 151

Dr. Seymour Romney — 152

Dr. Bernard J. Pisani — 154

Professor Aaron M. Schreiber — 155

Dr. Fred E. Mecklenburg — 160

Dr. Johan Eliot — 161

Dr. Donald Sloan — 167

C. Krauser — 176

Dr. David Bingham — 179

Dr. Judith Belsky — 185

Dr. Jane Hodgson — 193

Dr. Christopher Tietze — 198

Dr. Adele Hoffman — 205

Dr. Seymour Romney — 215

Excerpts From Religious Transcript:

Rabbi David Feldman — 223

Mr. Wogaman — 223

Rev. William B. Smith — 231

Miss Mary Peek — 233

Dr. James A. Wood, Jr. — 237

Dr. Lillian Lindt — 247

Plaintiffs' Exhibits: Page

14—Graph-Maternal Mortality Excluding Abortion.. 257

21—*Eleven Million Teenagers*, Alan Guttmacher Institute (1976), pp. 22-23 260

24—R. Lincoln, et al., "The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor," *Family Planning Perspectives*, Vol. 9, No. 5, Sept./Oct. 1977, Tables 1 & 3..... 262

27—N. Ryder, "Contraceptive Failure in the United States," *Family Planning Perspectives*, Vol. 5, No. 3, 1973, Table 7 266

144—Chart, Number of abortions performed at Bellevue, Jan. 1, 1969 to July 1, 1970 (proportion interviewed by Dr. Judith Belsky) 267

146—Chart, Bellevue-Suicide attempts during pregnancy 268

147—Chart, Bellevue-Attempts by Patient or Another Person to Induce an Illegal Abortion During This Pregnancy 269

148—Chart, Patients Successfully Obtaining Illegal Abortion During This Pregnancy 270

150—Letter No. 14, dated January 13, 1970 (Belsky).. 271

151—Letter No. 12, dated February 11, 1970 (Belsky) 273

152—Letter No. 5, dated November 13, 1969 (Belsky) 275

156—Letter No. 34, dated May 6, 1969 (Belsky) 277

159(1)—Letter No. 1, dated March 16, 1970 (Belsky)..... 280

159(7)—Letter No. 7, dated April 1, 1970 (Belsky) 282

159(x)—Letter dated November 13, 1969 (Belsky) 284

169—American Academy of Child Psychiatry Position on Medicaid Funding, November 2, 1977.... 286

177—Analysis of DHEW Table, "Average Monthly Number of Abortions Under Title XIX," June 7, 1978 Revision 289

240—Petitti, et al., "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age, submitted for publication as a Public Health Brief in the *American Journal of Public Health*, April 4, 1977, pp. 1, 3-6 294

Plaintiffs' Exhibits—Continued Page

248—HEW Memorandum to Task Group on Alternatives to Abortion from the Chair; Report from the Chair; July 25, 1977, pp. 2-3 297

455—A-D Letters submitted by Dr. Powell (A, dated October 13, 1977) and Hairston (B, dated October 13, 1977 & C, dated October 17, 1977) certifying and the letter of Dr. Perlman (D, dated October 20, 1977) refusing Medicaid for a fifteen-year old with a diagnosis of chronic glomerulonephritis 300

Defendants' Exhibit H—New York State Maternal Mortality Study, 1970-76, pp. 6, 25, 27-28, 30 304

Plaintiffs' Exhibits:

36—"A Call To Concern," *Christianity and Crisis*, October 13, 1977 307

347—A copy of a leaflet entitled "Abortion Is Murder" 309

312A—A photograph of a wall mural which says "God is Pro Life" which is painted on the side of St. Louis University's Baker Building at Grand Boulevard and Laclede Avenue, St. Louis, Missouri 311

462—"Speech To The Maryland Right To Life Banquet" delivered by defendant Henry Hyde, dated October 29, 1977, referred to in the May 30, 1978 Stipulation as Exhibit A to Plaintiffs' Second Notice to Admit 312

368—Copies of letters to the editor published in March 1978 in *The Yorktowner*, a Westchester newspaper which recently changed its name to *North County News* 314

139—Leaflet entitled "Baptists For Life" 316

137—Letter dated February 6, 1974 from Maranatha Baptist Bible College to Dr. James A. Wood, Jr., Executive Director, Baptist Joint Committee on Public Affairs 317

138—Letter dated March 25, 1974 from Pastor of Community Baptist Church, Sabattus, Maine, to Mr. Wood 318

457—Newsletter No. 3 of the Right to Life Society of Greenville 319

420—A copy of the October 25, 1973 Right to Life Newsletter 321

Plaintiffs' Exhibits—Continued Page

429—A copy of a letter dated March 31, 1976 signed by Helen M. Greene and Margaret Fitton respecting Save-A-Baby Campaign 322

433—A copy of a memorandum from Marge Fitton, Treasurer, to "Area Directors" respecting Respect Life Collections, dated September 3, 1976.. 323

444—A copy of the New York State Right to Life Committee, Inc. Statement of Revenues 324

352—A Bulletin of St. Louis Cathedral dated April 2, 1978 which contains a section "Picket Abortion Clinic" on page 2 325

308—A copy of the 1978 March for Life pamphlet..... 326

456—Photographs of the March for Life, January 22, 1978, Washington, D.C. 328

453—Photographs on the subject of abortion published in *The Long Island Catholic*, the official paper of the Rockville Diocese, January 19 and 26, 1978 329

Order allowing certiorari 332

76C 1804

APPEAL

McRAE, CORA, ET AL.

CORA McRAE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated,
PLAINTIFFS

v.

HEW

JOSEPH A. CALIFANO, JR., Secretary United States Department of Health, Education, and Welfare,
DEFENDANT

SENATORS JAMES L. BUCKLEY and JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA A. PERNICONE, ESQ., INTERVENOR-DEFENDANTS

Cause: Violation of US Constitution as a result of passage of H.R. 14232 containing "Hyde Amendment"—Related case: 72 C 386.

ATTORNEYS

Related case:

GREENBAUM, WOLFE & ERNST
437 Madison Avenue
New York, NY 10022
PL8-4010

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
By: JANET BENSHOFF
22 East 40th Street
New York, N.Y. 10016
(212) 725-1222

Atty. Deft:

DAVID G. TRAGER U. S. Atty:
By: RICHARD P. CARO A.U.S.A.

For Intervenor-Defendants:

Buckley, et al.
GERALD BODELL
102 East 35th Street
New York, N.Y. 10016

For Deft.-intervenor

A. LAWRENCE WASHBURN
117 Pennsylvania Avenue
Brooklyn, N.Y. 11207

DOCKET ENTRIES

DATE	PROCEEDINGS
10-1-76	Complaint filed. Summons issued.
10-1-76	Brief Amici Curiae filed.
10-1-76	By DOOLING, J-OTSC dtd 10-1-76 why a preliminary injunction pursuant to Rule 65 enjoining defts from enforcing the Hyde Amendment filed. ORDERED that pursuant to Rule 65 the deft etc his agents, are restrained from enforcing, in any way the Hyde Amendment etc filed.
10-1-76	By DOOLING, J-Order dtd 10-1-76 extending the tro until 10-21-76 at 10:40 am filed on document #3.
10-1-76	Pltffs' memorandum in support of their motion for a tro filed.
10-1-76	Affidavit of Irwin B. Teran filed.
10-5-76	Summons ret and filed/executed.
10-5-76	Letter dtd 10-1-76 to J. Dooling from Janet Benshoof re amici brief filed.
10-5-76	Copy of administrative letter of NYS Dept. of Social Services.

DATE	PROCEEDINGS
10-13-76	Defts memo of law filed.
10-18-76	Memorandum in opposition filed.
10-18-76	By DOOLING, J Order to show cause ret 10-18-76 why an order should not be entered advancing the case herein and consolidating pltffs' applications for preliminary injunction filed.
10-18-76	Proposed injunction filed.
10-18-76	Pltffs' memorandum in reply to deft's opposition etc filed.
10-18-76	USA's supp. memo of law filed.
10-19-76	Amici curiae brief filed.
10-20-76	Before DOOLING J-Case called. Motion to intervene on preliminary injunction argued. Decision reserved. Hearing adj'd.
10-20-76	Affidavit in support of motion to intervene filed.
10-20-76	Proposed answer to complaint of Cora McRae filed.
10-20-76	Affidavit in support of motion to intervene filed.
10-20-76	Affidavit in support of motion to intervene filed.
10-20-76	Memo in support of petition to intervene filed.
10-20-76	Petition of Isaoella M. Pernicone filed.
10-20-76	Unsigned otsc re intervention filed.
10-20-76	By DOOLING, J Order extending TRO to 10-22-76 at 5:00 p.m.
10-20-76	Affidavit of Lewis H. Koplick filed.
10-20-76	Memo of law in support of Buckley et al to intervene filed.
10-21-76	Sten. transcript dtd. 10-1-76 filed.

DATE	PROCEEDINGS

10-21-76 Supplemental affidavits of A. Lawrence Washburn, Jr.

10-22-76 By DOOLING J-Memo & Order dtd 10-22-76 enjoining the deft's from enforcing the Hyde Amendment filed. Pltff's McRae and Teran are entitled to maintain this action pursuant to Rule 23(a) etc.

10-22-76 By DOOLING, J-Order dtd 10-25-76 that the application pending appeal is denied.

10-27-76 Unsigned application pursuant to Rule 8(a) for a stay pending appeal.

10-28-76 By DOOLING, J-ORDER TO SHOW CAUSE ret 10-29-76 for an order amend- the Order of this Court dtd 10-22-76 filed.

10-29-76 Notice of appeal to US Supreme Court and application for an stay of district court order 10-22-76 filed. copies mailed.

10-29-76 Before DOOLING, J.—Case called for motion to amend judgment. Decision reserved and hearing adjd

10-29-76 Affidavit of E. Paul & pltff's statement in opposition to amend order filed.

10-29-76 USA's proposed modification to order filed.

11-1-76 By DOOLING, J-Order dtd 10-29-76 denying the motion to amend the order of 10-22-76 filed.

11-3-76 Letter dtd 11-2-76 to J. Dooling from Rhonda Copelon with copies of papers filed by pltff opposing the deft-intervenors application for stay.

11-19-76 Notice of appeal to the Supreme Court filed. (USA) Copy mailed

11-22-76 Sten. transcript dtd. 10-18-76 filed.

12-6-76 Above record certified and mailed to US Supreme Court

DATE	PROCEEDINGS

12-15-76 HEW's notice of appeal filed. Copy mailed to the C of A.

12-17-76 Notice of appeal to the Federal Court of Appeals for the Second Circuit filed. $250.00 deposited in the registry of the Court (in lieu of bond) by A. Lawrence Washburn, Jr. atty for the Appellant-Intervenor Isabe;; a M. Pernicone. Copy mailed to the C of A.

12-22-76 Civil appeal scheduling order filed.

1-5-77 Sten transcript dtd 10-29-76 filed.

7-25-77 Copy of letter of Clerk, Supreme Court dtd 7-20-77 filed re: application for a stay of execution. ld

7-25-77 Copy of opinion of Supreme Court filed (annexed to doc. #46) re: Justice Marshall has decided not to act on the application for a stay of execution of the Sup Ct's vacatur of the district court's injunction. ld

7-27-77 Unsigned ORDER TO SHOW CAUSE-In Re: motion for temporary restraining order & supporting affidavits, filed. by pltff.

7-27-77 Affidavits respecting survey of state reimbursement policies filed by pltff.

7-27-77 Affidavits of state officials respecting reimbursement policies filed by pltff.

7-27-77 Unsigned ORDER TO SHOW CAUSE respecting intervention and amendment of the complaint, and affidavits in support filed by pltff.

7-27-77 Amended complaint filed by pltff.

7-27-77 Proposed Intervenor complaint, filed by pltff.

7-27-77 AFFIDAVITS of intervenors, also supporting motion for temporary restraining order filed by pltff.

7-27-77 MEMORANDUM OF LAW in support of motion to intervene and to amend the complaint filed by pltff.

DATE	PROCEEDINGS

7-27-77 Letter of AUSA Edward S. Rudofsky to DOOLING, J. dtd 7/27/77. IN RE: Opposing entry of temporary restraining order, filed.

7-28-77 Certified copy of Judgment from SUPREME COURT of U.S. that judgment of U.S. District Court in this cause be and is hereby vacated, and that this cause be & is hereby remanded to the U.S. District Court for the EAST. DIST. of NY for further consideration in light of Maher -v- ROE 432 U.S. & Beal -v- Doe 432 U.S. (1977) filed.

7-28-77 Pltff's MEMORANDUM in support of motion for a temporary restraining order. filed.

7-28-77 Before DOOLING, —Case called. Motion for tro argued, and granted. Hearing on motion for preliminary injunction scheduled for 8-3-77. Motion for interventions argued. Motion granted. Motion for amended complaint, defts not consenting motion granted.

7-28-77 By DOOLING, J—Order to show cause I dtd 7-28-77 returnable on 8-3-77 why an order should not be entered temporarily restraining effectuation of the Hyde Amendments pending hearing on pltffs' motion for a preliminary injunction etc filed. ORDERED that deft shall continue to pay the federal share in accordance with procedures prior to enactment of the Hyde Amendment filed. See #47.

7-28-77 Affidavit of Ellen Leitzer filed. mg

7-28-77 Affidavit of Dr. David Bingham filed. mg

7-28-77 Copy of letter dtd 7-2-77 to Janet Benshoof from Leon Ginsburg re expenditures of state monies for abortions filed. mg

7-28-77 Affidavit of C. Tietze filed. mg

7-29-77 Pltff's first notice to produce documents pursuant to Rule 34 of F.R.C.P., filed.

8-2-77 Cert. copy of judgment from Supreme Court dismissing the appeal. (acknowledgement mailed.)

DATE	PROCEEDINGS

8-3-77 Deft's memorandum in opposition to pltff's motion for preliminary injunction filed. mg

8-4-77 By DOOLING, J-Order to show cause why ab order should not be made vaacting the tro entered 7-28-77 filed. mg

8-4-77 By DOOLING J-Order to show cause for leave to file a second amended complaint ret 8-3-77 filed. mg

8-3-77 Before DOOLING, J.—Case called. Pltff Health & Hospitals Corp moves to amend the complaint. Decision reserved. Deft intervenors moves to reconsider the vacation of the TRO. Decision reserved. Deft intervenors move to quash the hearing of pltffs evidence. Motion denied with leave to renew. Deft moves that pltff be required to make offers of proof of prior to testimony in order to the scope of the hearing. Motion denied.

8-4-77 By DOOLING, J.—Order dtd 8-4-77 vacating TRO filed on document #47.

8-4-77 By DOOLING, J.—Order dtd 8-4-77 vacating TRO filed on document #10.

8-4-77 Unsigned order to show cause filed.

8-4-77 By DOOLING, J.—Order to show cause to intervene filed on document #67.

8-5-77 Pltff's second notice to produce filed.

8-5-77 Letter of 7-26-77 to Judge Dooling from Rhonda Copelon filed.

8-5-77 Pltff's reply in support of restraining order filed.

8-5-77 Affidavit of Alexander Sharp filed.

8-5-77 Intervenor defts' memo of law in support of application to vacate tro and in opposition to pltff's application for preliminary injunction filed.

8-5-77 By DOOLING, J.-Order dated 8-3-77 re: not signing of order to show cause filed.

DATE	PROCEEDINGS
8-5-77	By DOOLING, J.-Order dated 8-4-77 denying temorary restraining order filed.
8-4-77	Before DOOLING, J.—case called—motion to dissolve T.R.O. reviewed pltff moves for T.R.O.—pltff moves to allow as pltff-intervenors Mary Doe and David Bingham—motion granted—motion to dissolve T.R.O. granted —T.R.O. is vacated—motion to extend TRO denied—hearing adjd without date
8-5-77	Stenographer's transcript dated 8-3-77 filed.
8-5-77	Stenographer's transcript dated 8-4-77 filed.
8-5-77	Intervenors-defts supplemental memorandum filed.
8-5-77	Memorandum in support of intervening-deft motion in liminie to exclude oral testimony etc. filed
8-8-77	Before DOOLING, J.—Case called. Pltff's proposed notice argued. Proposed notice not signed. Discovery motion argued. Ruling on the record. mm
8-9-77	Unsigned proposed notice filed. mm
8-10-77	Stenographer's transcript dtd 8-8-77 filed. mm
8-11-77	Before DOOLING, J.—Case called. Hearing resumed. Hearing continued to 9-9-77. mm
8-12-77	Memorandum of law in support of motion to intervene filed. mm
8-12-77	Proposed intervenor complaint filed. mm
8-12-77	Stenographer's transcript dtd 7-28-77 filed. mm
8-12-77	Stenopgrapher's Transcript dated 8/11/77 filed.
8-23-77	Pltffs first set of interrogatories to deft filed. tk
8-25-77	Memo filed to all counsel from Art Leavens dtd 8/25/77, re: calling of witnesses in Sept. tk
8-25-77	Copy of memo filed to all counsel from Art Leavens dtd 8/25/77, re: calling of witnesses in Sept. tk

DATE	PROCEEDINGS
8-29-77	Affidavit of Frederick Jaffe filed re based on the Institute's studies of the impact of the withdrawal or restricting of Medicaid reimbursement for abortion. jilj
9-1-77	Before DOOLING, J.—Case called. Hearing resumed. Trial continued to 9/6/77.
9-6-77	AFFIDAVIT of Alexander E. Sharp, II, Commissioner of the Massachusetts Department of Public Welfare, filed. (THIS DOCUMENT IS THE ORIGINAL of Document #71)
9-6-77	Before Dooling, J case called-hearing resumed-hearing contd to 9/7/77.
9-7-77	Before Dooling, J hearing resumed-hearing contd to 9/19/77. jlj
9-9-77	Stenographers transcript filed dtd 9/7/77. tk
9-20-77	Before DOOLING J.—Case called. Hearing resumed. Hearing continued to 9/23/77. tk
9-23-77	Before Dooling, J—case called—hearing resumed—hearding contd to 9/26/77.
9-26-77	Before DOOLING,J.—Case called. Hearing resumed. Hearing continued to 9-28-77. mm
9-28-77	Before DOOLING, J.—Case called. Hearing resumed. Hearing cont'd to 9-30-77.
9-30-77	Before DOOLING J.—Case called. Hearing resumed. Hearing continued to Oct. 4, 1977. tk
10-4-77	Before Dooling, J—case called—hearing resumed—trial contd to 10/5/77.
10-5-77	Before Dooling, J—case called—hearing resumed—trial contd to 10/7/77.
10-6-77	Copy of letter filed to Mr. Copelon from Michael Rodak that the Court (Supreme Court) denied the petition for rehearing in the above action. tk
10-11-77	Before Dooling, J—case called—hearing resumed—trial contd to 10/12/77.

DATE	PROCEEDINGS

10-12-77 Before DOOLING, J. Case called. Hearing resumed. Hearing continued to 10/14/77.

10-14-77 Before DOOLING, J. Case called. Hearing resumed. Hearing adjourned without date.

10-17-77 Stenographers transcript dtd 10/14/77 filed. tk

11-29-77 Notice to take deposition upon oral exam of Connie J. Downey, on 12/2/77 @ 9:00 AM at EDNY, filed. jm

11-30-77 Notice to take deposition upon oral examination of Peter Schuck, Dep assist HEW on 12/6/77 @ 1 PM in EDNY, filed. jm

12-2-77 Before DOOLING J—Motion for protective order. Ordered that no depositions at Downey or Schuck be taken but that documents be produced. tk

12-8-77 By Dooling, J.—Order dtd 12/8/77 directing clerk to withdraw from Registry sum of Two Hundred Fifty ($250) dollars and pay same to A.L. Washburn, Jr. as and for complete refund of moneys previously deposited in lieu of bond, filed. jm

12-27-77 Defts supp. answer to pltff's interroga. #3 filed. fy

1-6-78 Before DOOLING, J.—Case called for hearing, motion to amend, no opposition, motion granted

1-9-78 Pltffs amended complaint filed.

1-9-78 Affidavit of Jane E. Hodgson filed. tk

1-9-78 Pltff—intervenors affidavit by Theressa Hoover filed. tk

1-25-78 Deft's answer to amended complaint, filed. jm

2-2-78 Letter dtd 1/31/78 of R. Copelon to Dooling, J.—filed. jm

2-9-78 Motion of Catholic League for Religious and Civil Rights etc., to intervene as party defts filed. fy

DATE	PROCEEDINGS

2-9-78 Before DOOLING, J.—Case called for hearing, hearing resumed and cont to 2-14-78.

2-14-78 Pltff's memo of law in opposition to Catholic League to intervene filed. fy

2-15-78 Before Dooling, J.—Case called. Hearing resumed. Hearing adjounred to 2/16/78. jm

2-14-78 Before DOOLING, J. Case called. Hearing resumed. MOTION by CATHOLIC LEAGUE, et al to intervene as party-defts-ARGUED. MOTION DENIED except to the extend that petitioners may appeal as amici curiae. (SEE ORDER ON BACK OF MOTION PAPERS) Hearing adjourned to 2/15/78.

2-17-78 Before DOOLING, J—Case called. Hearing resumed. Hearing adj'd to 2-21-78. mg

2-23-78 Before DOOLING,J—Case called. Hearing resumed. Adj'd to 3-2-78. mg

3-2-78 Before DOOLING,J—Case called. Hearing resumed. Intervenor-deft's motion to strike the testimony of certain of pltff's witnesses argued and denied. Hearing adj'd to 3-8-78. mg

3-7-78 Notice to take deposition of persons listed on date given, filed. (of W. Sweeney, of Rev. P.V. Ahern, of C.J. Tobin, Jr.)

3-7-78 Sten. transcript dtd 3-2-78 filed. mg

3-10-78 Before Dooling, J.—Case called. Hearing resumed. Adjourned w/o date. jm

3-16-78 Pltffs second set of interroga. to deft filed. fy

3-28-78 Before Dooling, J.—Case called. All parties present. Continued to 3/29/78 @ 10 AM. jm

3-29-78 Before DOOLING, J—Case called. Hearing resumed. Cont'd to 3-30-78. mg

DATE	PROCEEDINGS

3-30-78 Before DOOLING, J.—Case called for hearing, hearing resumed, hearing cont to 3-31-78.

3-31-78 Before DOOLING, J.—Case called for hearing, hearing resumed, hearing adjd without date

4-20-78 Deft's notice of motion returnable 4-21-78 for protective order and memorandum of law in support of deft's motion for protective orders. km

4-21-78 Before DOOLING, J.—Case called, Parties present. H.E.W.'s MOtion for protective order argued. Pltff's motion for the introduction of certain documents into evidence—argued. Parties to confer and report to court 4/28/78. Deft H.E.W. to answer interrogatories on or before May 15, 1978. Order signed. Adjourned without a date. ls

5-2-78 Stipulation between counsel for the pltffs and deft, that documents identified as Exhibits 200-256 and 260-266, will be admitted to evidence pursuant to certain terms. (see order) filed. ls

5-2-78 letter= dtd 5/1/78, from J. BENSHOFF, counsel for Pltff, to R. CARO, A.U.S.A.. filed. ls

5-2-78 Letter dtd 5/1/78, from Jill Laurie Goodman, to Mr. CARO, A.U.S.A., filed. ls

5-2-78 Pltff's Interrogatories and notice to produce (midified), filed. ls

5-2-78 Janet Benshoof's Affidavit in support of Pltff's proposed Exhibits No. 258 and 259, filed. ls

5-2-78 Pltff's request that Deft JOSEPH CALIFANO admit for purposes of this action only the truth of certain facts, filed. ls

5-22-78 Letter from A. Lawrence Washburn dated 5/19/78 filed

5-22-78 Answer to pltff's second notice to admit (Hyde) filed. sg

DATE	PROCEEDINGS

5-22-78 Answer to pltff's first notice to admit and addendum filed sg

6-2-78 Stipulation agreed by and between the parties, that certain affidavits shall be admitted into evidence. filed. ls

6-9-78 Deft's objections and answer to pltffs' motion to admit, filed. jm

6-23-78 Before DOOLING, J.—Case called for hearing, hearing resumed, hearing adjd without date. fy

6-27-78 By DOOLING, J.—Privacy Act Order dtd 6-27-78 that the deft disclose information pertaining to various individuals who may be identifiable from said information, or other info readily accessible, contained in certain agency files, to the extent disclosures of such info is necessary to answer and comply with pltffs' third interrogatories and Notice to produce in good faith filed. km

6-27-78 Answer to pltffs' third interrogatories and Notice to Produce, filed. km

6-29-78 Answer to pltff's second (modified) interrogatories Nos. 5-7 and notice to produce. Filed. ls

7-19-78 Certified copy of order received from court of appeals and filed dismissing appeal

7-31-78 Letter dtd 7/26/68, from Richard Caro to Judge Dooling. In re: annexed please find copy of letter from General counsel office. Filed. ls

8-3-78 Pltffs first notice to admit filed. fy

8-3-78 Pltffs second notice to admit filed. fy

8-3-78 Pltffs first notice to admit, addendum I filed. fy

8-2-78 Before DOOLING, J.—Case called for hearing on motion to introduce evidence of pltff, all parties present, Hearing ordered and begun, hearing contd to 8-3-78. fy

DATE	PROCEEDINGS

8-3-78 Before DOOLING, J.—Case called, for hearing on motion to introduce evidence of Pltff. Hearing resumed. Hearing concluded. Case adjourned to 8/28/78, at 10:00 for Deft-intervenors case. Deft's briefs due by 10/2/78.

8-4-78 Pltff's second notice of admit. filed. ls

8-14-78 Stenographers transcript filed dtd. 8-2-78 jc

8-14-78 Stenographers transcript filed dtd. 8-3-78 jc

8-16-78 Pltffs statement of facts on issues other than religion filed.

8-16-78 Notice of motion ret. 8-28-78 for leave to submit brief amicus curiae filed. fy

8-18-78 Notice of Motion for leave to file brief of new legal defense and education fund, as *amicus curiae*, returnable on August 28, 1978, at 10:00 am. Filed. ls

8-18-78 Motion of American Academy of Child Psychiatry to file a brief as amicus curiae filed. fy

8-21-78 Supplement to deft's answers to pltff's first & second interrogatories filed. mg

8-23-78 Affidavits (2) of service, filed. ls

8-28-78 Before DOOLING, J.—Case called for motions to file briefs amicus curiae granted, briefing schedule set, oral argument on 11-9-78. fy

8-29-78 By DOOLING, J.—Order dtd. 8-28-78 granting motion of American Orthopsychiatriac Ass., to file amicus curiae brief by 10-20-78 filed. on back of doc. 139. fy

8-29-78 Notice of motion of American Ortho to file amicus curiae brief filed. fy

8-28-78 By DOOLING, J.—Order dtd. 8-28-78 granting motion of Religiuos organizations to file amicus curiae brief by 10-20-78 filed on back of doc. #133. fy

8-29-78 By DOOLING, J.—Order dtd. 8-28-78 granting motion of NOW LDEF to file an amicus curiae brief by 10-20-78 filed. on back of doc #134. fy

DATE	PROCEEDINGS

8-29-78 By DOOLING, J.—Order dtd. 8-28-78 graing motion of J. Heintz & M. Rogers to appear pro hoc vice filed on doc. #135. fy

8-29-78 By DOOLING, J.—Order dtd. 8-28-78 granting motion of American Academy of Child Psychiatry to file an amicus curiae brief by 10-20-78 filed on doc. #135. fy

8-30-78 Sten. transcript dtd. 12-2-77 filed. fy

9-5-78 Copy of Memorandum of Law of pltff. Filed. ls

9-5-78 Notice to take deposition of H. Hyde filed. fy

9-8-78 Second supplement to defts answers to pltffs first, 2nd interrs and notice to produce, filed. jm

9-6-78 Before Dooling, J.—Case called, all sides present, hearing concluded. jm

9-11-78 Sten. transcript dtd. 9-6-78 filed. fy

9-18-78 Statement of facts on issues other than religion. Filed. ls

9-18-78 Brief of Amici Curiae in support of pltffs' complaint filed rh

9-18-78 Brief of Now Legal Defense & Education Fund as Amicus Curiae in support of Pltffs filed rh

9-19-78 Letter dtd. 9/14/78 from Rhonda Copelon to Hon. John F. Dolling, Jr. together with attchmt re continued authorization & appropriations for the U.S. Commission on Civil Rights filed rh

9-21-78 Deft's Second Supplement to Deft's Answers to Pltffs' First, Second, & Second (Modified) Interrogatories & Notices to Produce: *Continued* filed rh

9-25-78 Pltffs' Memorandum of Law on the Vagueness Claim filed. sk

10-3-78 Pltff's memorandum in support of a default against intervenor-deft's. Filed. ls

DATE	PROCEEDINGS

10-3-78 Notice of Motion for entry of default judgment, returnable on October 6, 1978, at 9:30 am. Filed. ls

10-11-78 Affidavits of LAWRENCE WASHBURN, in opposition to motion for entry of default judgment against interevnor-deft's. Filed. ls

10-11-78 Pltff's first amendment brief, filed. ls

10-11-78 Affidavit of service of brief, filed. ls

10-27-78 Notice of motion for leave to file brief Amici Curiae, no ret date, filed, jm

10-27-78 BRIEF of AMICUS CURIAE of American Academy of Child Psychiatry, filed.

11-3-78 By DOOLING, J.—Order dtd. 11-2-78 granting motion of Committee For Abortion Rights for leave to file brief amici curiae etc., filed on back of doc. #156. fy

11-14-78 Post-trial memo of law of Pernicone filed. fy

11-14-78 Intervenors-defts reply memo of law to pltffs first amendment brief filed. fy

11-14-78 Brief of Amicus curiae filed. fy

11-14-78 Intervenors memo of law on title XIX of the Social Security Act filed. fy

11-16-78 Intervenors' Memorandum on Title XIX of the Social Security Act, Equal Protection, Due Process & Vagueness Claims. mw

11-16-78 Affidavits of service of "Defendant's Post-Trial Memorandum of Points & Authorities" filed. (AUSA Richard P. Caro). mw

11-16-78 Affidavit of service of Thomas J. Marzen filed. mw

11-16-78 Deft's Post Trial Memorandum filed. mw

11-16-78 Brief of Amici Curiae filed. mw

11-30-78 Pltffs' Reply to Defts' Post Trial Memoranda filed rh

DATE	PROCEEDINGS

12-1-78 Letter dtd. 11-29-78 from J. Benshoof to J. Dooling with opinion attached from Eastern District of La., filed. fy

12-4-78 Before DOOLING, J.—Case called for hearing on the law, post trial hearing ordered and begun, hearing concluded. fy

12-5-78 By DOOLING, J.—Order dtd. 11-28-78 amending the amended complaint filed. fy

12-8-78 Sten. transcript dtd. 12-4-78 filed. fy

12-13-78 Letter dtd. 12-12-78 from R. Caro AUSA to J. Dooling re: HEW medicaid regulations filed. fy

1-17-79 Letter (copy) dated 1/12/79 from Edward R. Korman, U.S. Atty by: Richard P. Caro, Assistant U.S. Atty, re Ms. Copelan's failure to date to file a motion to have the action recertified as a class action and inquiring of Ms. Copelan as to her present position re class certification in order that it can be decided if any modification in the federal deft's position will be made filed rh

1-24-79 Letter dated 12/18/78 from Jack Brooks to Mr. Lewis Orgel, Clerk stating that pursuant to House Resolution 420, 95th Congress, 1st Session (1977), the House Select Committee on Congressional Operations is required to identify any court proceeding or action of vital interest to Congress and to bring such action to the attention of the House of Representatives—one such case is Buckley v. McRae #76C 1804 and requesting copies of documents #98, 101, 108, 109, 117, 118, 120, 124, 141, 142, 145, 150, 151, 154, 158, 161, 162, 165, 166, 167 and 169 be sent to House Select Committee on Congressional Operations, 1628 Longworth House Office Building, Washington, D.C. 20515 filed rh

1-29-79 Sten. transcripts dtd. 9-1-77, 9-6-77, 9-19-77, 9-20-77, 9-26-77, 9-28-77, 9-30-77, 10-4-77, 10-5-77, 10-11-77, 10-12-77, 2-9-78, 2-14-78, 2-15-78, 2-16-78, 2-17-78, 2-23-78, 3-8-78, 3-10-78, 3-28-78, 3-29-78, 3-30-78, 3-31-78, and 4-21-78 filed. fy

DATE	PROCEEDINGS
1-29-79	Document stipulation #II filed. fy
1-29-78	Documents stipulation #III filed. fy
1-29-79	Documents stipulation #IV filed. fy
1-30-79	Sten. transcript dtd. 10-29-76 filed. fy
1-30-79	Ltr dtd 1/24/79 fm Janet Benshoof to Judge Dooling re: class action certification, filed. mw
1-30-79	By DOOLING, J.—MEMORANDUM & ORDER dtd 1/29/79, that pltffs' motion for an order directing entry of a default judgment against Intervenor-Defts denied. . . . The action has to this date in fact been maintained as a class action & should continue to be so maintained, filed. (See MEMO & ORDER for details). mw
2-2-79	Stenographers transcript dtd 6/23/78. Filed. ls
2-5-79	Letter dtd. 2-2-79 from R. Copelon to all counsel re: film showing on 2-8-79 filed. fy
2-8-79	Before DOOLING, J.—Case called for conf and conf held. fy
2-8-79	Letter dtd. 2-6-79 from R. Copelon to J. Dooling re: attached are certified and complete copies of exhibits #63, 79, 83 & 84 filed. fy
2-8-79	Renewed motion of Catholic League for Religious & Civil Rights to intervene filed. fy
2-22-79	Letter dtd 2/20/79, from Richard P. Caro to Judge Dooling. In re: the deft has no objection to the intervention of the Catholic League for Religious and Civil rights. Filed. ls
3-14-79	Deft HEW's supp. memo of law of points & authorities filed. fy
3-21-79	Letter dtd. 3-21-79 from G. Bodell to J. Dooling with copies of HEW statistics filed. fy
3-23-79	Sten. transcript dtd. 2-8-79 filed. fy

DATE	PROCEEDINGS
4-16-79	Two letters filed dtd 4-12-79 & 4-19-79. fc
5-11-79	Letter dtd. 5-7-79 from R. Caro AUSA to J. Dooling filed. fy
8-1-79	Letter dtd. 7-31-79 from R. Copelon to J. Dooling with copies of state court decisions and copy of a complaint in another action attached, filed. fy
9-12-79	Letter dtd 9-6-79 to all counsel from AUSA Richard Caro re agreement of all counsel 1977 CDC Abortion Surveillance Report etc. be placed into evidence subject to same terms previously stipulated filed.
1-15-80	By DOOLING, J.—Memo and order for judgment that judgment must be entered for pltffs, that pltffs and pltffs-intervenors are entitled to maintain this action as a class action on behalf of medicaid-eligible pregnant women desiring and denied medicaid abortions because of the federal legislation restricting abortion funding etc., see memo and order, filed. fy
1-15-80	By DOOLING, J.—Annex to memo and order dtd. 1-15-80 filed. fy
1-15-80	Judgment dtd. 1-15-80 approved by J. Dooling in favor of pltffs etc., see judgment, filed. fy
1-15-80	By DOOLING, J.—Order dtd. 1-15-80 staying enforcement of judgment for 30 days from 1-15-30, filed. fy
1-15-80	By DOOLING, J.—Order amending complaint filed on 1-9-78 etc., see order, filed. fy
1-15-80	Notice of appeal filed by USA to Supreme Court. copies mailed to parties & Sup. Ct., filed. fy
1-28-80	Notice of appeal filed by intervenor-defts. (rec. 1-25-80). copy mailed to Sup. Ct. fy
1-28-80	Deft-intervenors' application for extension of stay pending appeal filed. fy

DATE	PROCEEDINGS

1-31-80 Notice of motion ret. 2-4-80 with memo of law for an extension of the stay pending final determination of the appeal by the US Supreme Court filed. fy

2-4-80 Pltffs notice of motion ret. 2-4-80 with memo of law to clarify the judgment and in opposition to defts motion for a stay filed. fy

2-4-80 Defts-intervenors's memo of law in support of a limited extension of the stay filed. fy

2-4-80 Before DOOLING, J.—Case called for civil motio. Defts motion for a stay of the judgment pending appeal argued and denied. Pltffs motion for an order to clarify the judgment argued and denied. fy

2-4-80 By DOOLING, J.—Order that pltffs motion to clarify the judgment etc., is denied filed. fy

2-4-80 By DOOLING, J.—Order that the motions for an order extending the stay entered 1-15-80 are in all respects denied filed. fy

2-13-80 Sten. transcript dtd. 2-4-80 filed. fy

2-14-80 By DOOLING, J.—Order that exhibits 300-454 and 456-471 are received in evidence etc., see order, filed. fy

2-19-80 Certificed copy of order from Supreme Court staying judgment of district court pending further order, filed. fy

2-25-80 Certified copy of order from Supreme Court denying application for stay and that probable jurisdiction is noted, etc., filed. fy

2-28-80 Copy of letter dtd. 2-27-80 from R. Copelon to R. Caro, AUSA filed. fy

76C 1805

APPEAL

NEW YORK CITY HEALTH & HOSPITALS CORP.

NEW YORK CITY HEALTH & HOSPITALS CORP. and THE CITY OF NEW YORK, PLAINTIFFS

v.

HEW

F. DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

SENATOR JAMES L. BUCKLEY and JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE, and ISABELLA M. PERNICONE, ESQ., INTERVENORS-DEFENDANTS

Cause: Civil action for injunctive and declaratory relief to restrain the enforcement of the Hyde Amendment to HR 14232 Bill prohibiting federal funds for reimbursement of Medicaid abortions. Related case 76C 1804.

ATTORNEYS

For Pltff:

W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
Municipal Bldg.
NYC 10007
566-5500/2197

DOCKET ENTRIES

DATE	PROCEEDINGS
10-1-76	Complaint filed. Summons issued.
10-1-76	By DOOLING, J—OTSC dtd 10-1-76 why a preliminary injunction pursuant to Rule 65 enjoining defts from enforcing the Hyde Amendment filed. ORDERED that pursuant to Rule 65 the deft, his agents, etc are restrained from enforcing, in any way the Hyde Amendment etc filed.
10-1-76	By DOOLING, J—Order dtd 10-1-76 extending the tro until 10-21-76 at 10:40 am filed on document #2.
10-1-76	Pltff's memorandum in support of tro filed.
10-5-76	Summons ret and filed/executed.
10-13-76	Defts memo of law filed in 76-C-1805.
10-18-76	Memorandum in opposition filed ib 76C 1804. (USA)
10-18-76	Pltff's memo in support of its motion for a preliminary injunction and to consolidate with hearing on permanent injunction.
10-18-76	Affidavit of Steven Goldberg filed.
10-18-76	By DOOLING, J—ORDER TO SHOW CAUSE ret 10-18-76 why an order should not be entered advancing the case herein and consolidating pltffs' applications for preliminary and permanent injunction filed in 76C 1804.
10-18-76	Proposed injunction filed. See 76C 1804.
10-18-76	USA's supp memo of law filed. in 76-C-1804.
10-19-76	Before DOOLING J—Case called. Motion to intervene on preliminary injunction argued. Decision reserved. Hearing adj'd.
10-20-76	Affidavit in support of motion to intervene filed in 76C 1804.

DATE	PROCEEDINGS
10-20-76	Affidavit in support of motion to intervene filed in 76C 1804.
10-20-76	Affidavit in support of motion to intervene filed in 76C 1804.
10-20-76	Memorandum in support of petition of I. M. Pernicone filed in 76C 1804.
10-20-76	Petition of I. M. Pernicone filed in 76C 1804.
10-20-76	By DOOLING J—Order dtd 10-20-76 extending tro to 10-22-76 at 5:00 riled in 76C 1804.
10-20-76	Unsigned order to show cause re intervention filed. See 76C 1804.
10-20-76	Pltff's memo of law in opposition to motion for intervention by 2 Senators & 1 Congressman filed.
10-20-76	Memo of law in behalf of Buckley et al to intervene filed, in 76-C-1804 filed
10-20-76	Proposed answer to complaint of Buckley et al filed.
10-21-76	Sten. transcript dtd. 10-1-76 filed in 76-C-1804.
10-21-76	Supplemental affidavits of A. Lawrence Washburn filed.
10-22-76	By DOOLING, J—Memo & Order dtd 10-22-76 enjoining the defts from enforcing the Hyde Amendment filed. Pltff's McRae & Teran are entitled to maintain this action pursuant to Rule 23(a) See 76C 1904.
10-22-76	By DOOLING J—Order dtd 10-25-76 that the application for a stay pending appeal is denied filed in 76C 1804.
10-20-76	Letter dtd. 10-26-76 from S. Goldberg to Judge Dooling filed.
10-29-76	Notice of appeal to US Supreme Court and application for an stay of district court order dtd. 10-22-76 filed in 76-C-1804.

DATE	PROCEEDINGS

10-29-76 Before DOOLING, J.—Case called for motion to amend judgment. Decision reserved and hearing adjd.

10-29-76 USA's proposed modification order filed. in 76-C-1804.

11-1-76 By DOOLING, J—Order dtd 10-29-76 denying the motion to amend the order of 10-22-76 filed. See 76C 1804.

11-19-76 Notice of appeal to Supreme Court filed in 76C 1804. (USA).

11-22-76 Sten. transcript dtd. 10-18-76 filed in 76-C-1804.

12-6-76 Above record certified and mailed to US Supreme Court

12-15-76 HEW's notice of appeal filed in 76C1804. Copy mailed to the C of A.

12-17-76 Notice of appeal to the Federal Court of Appeals for the Second Circuit filed in 76C 1804. copy mailed to the C of A.

12-22-76 Civil appeal scheduling order filed in 76C1804.

1-5-77 Sten. transcript dtd 10-29-76 filed in 76C 1804.

7-25-77 Copy of letter of Clerk, Su½reme court dtd 7-20-77 filed in 76 C 1804 re: application for stay of execution. ld

7-25-77 Copy of opinion of Supreme Court filed (annesed to doc. #46 in 76 C 1804) re: Justice Marshall has decided not to act on the application for a stay of execution of the Sup Ct's vacatur of the district court's injunction. ld

7-27-77 Unsigned ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION and a temporary restraining order filed. by atty's for pltff.

7-27-77 Amended verified complaint filed by pltff.

DATE	PROCEEDINGS

7-28-77 By DOOLING, J—Order to show cause ret 8-3-77 why an order should not be made enjoining the dedt from refusing to pay matching funds for abortions filed. ORDERED that the deft and his agents are temporarily restrained from refusing to pay matching funds etc pending a determination by this Court of pltff's application filed. mg See document #10.

7-28-77 Request for productions of documents filed. mg

8-1-77 Record on appeal received from Supreme Court USA. Acknowledgment mailed to Clerk for receipt. mm

8-2-77 Cert. copy of judgment from Supreme Court dismissing the appeal filed. Acknowledgment mailed. See 76C 1804. mg.

8-3-77 Deft's memorandum in opposition to pltff's motion for preliminary injunction filed. See 76C 1804. mg

8-4-77 By DOOLING, J—Order to show cause why an order should not be made vacating the tro entered 7-28-77 filed in 76C 1804. mg

8-4-77 By DOOLING, J—Order to show cause for leave to file a second amended complaint ret 8-3-77 filed in 76C 1804. mg

8-3-77 Before DOOLING, J.—Case called. Pltff Health & Hospitals Corp moves to amend the complaint. Decision reserved. Deft intervenors moves to reconsider the vacation of the TRO. Decision reserved. Deft intervenors moes to quash the hearing of pltffs evidence. Motion denied with leave to renew. Deft moves that pltff be required to make offers of proof of prior to testimony in order to narrow the scope of the hearing. Motion denied. mm

8-4-77 Before DOOLING, J.—case called—motion to dissolve TRO reviewed—pltff moves for TRO-pltff moves to allow as pltff intervenors Mary Doe and David Bingham—motion granted—motion to dissolve TRO granted—TRO vacated—motion to extend TRO denied—hearing adjd without date

DATE	PROCEEDINGS

8-5-77 Stenographer's transcript dated 8-3-77 filed in 76C 1804

8-5-77 Stenographer's transcript dated 8-4-77 filed in 76C 1804

8-5-77 Intervenor deft supplemental memorandum filed (in 76C1804)

8-5-77 Memorandum in support of intervening-deft in liminie to exclude oral testimony etc. filed (in 76C1804)

8-8-77 Before DOOLING, J.—Case called. Pltff's proposed notice argued. Proposed notice not signed. Discovery motion argued. Ruling on the record. mm

8-9-77 Unsigned proposed notice filed in 76C-1804. mm

8-11-77 Before DOOLING, J.—Case called. Hearing resumed. Hearing continued to 9-9-77. mm

8-31-77 Copy of letter of AUSA Rudofsky to Dooling, J dtd 8/30/77 filed re in reference to several inquiries made to chambers etc. jlj

9-6-77 Before Dooling, J—case called—hearing resumed—hearing contd to 9/7/77.

9-7-77 Before Dooling, J—hearing resumed—hearing contd to 9/19/77. jlj

9-9-77 Stengraphers transcript filed dated 9/7/77. (filed in 76 C 1804)

9-20-77 Before DOOLING J.—Case called. Hearing resumed. Hearing continued to 9/23/77 tk

9-23-77 Before Dooling, J—case called—hearing resumed—hearing contd to 9/26/77.

9-26-77 Before DOOLING J—Case called. Hearing resumed. Hearing continued to 9-28-77. mm

9-28-77 Before DOOLING, J.—Case called. Hearing resumed & cont'd to 9-30-77. ld

DATE	PROCEEDINGS

9-30-77 Before DOOLING J—Case called. Hearing resumed. Hearing continued to 10/4/77. tk

10-11-77 Before Dooling, J—case called—hearing resumed—trial contd to 10/12/77.

10-12-77 Before DOOLING, J.—Case called. Hearing resumed. Hearing continued to 10/14/77.

10-14-77 Before DOOLING, J.—Case called. Hearing resumed. Hearing adjourned without date.

12-2-77 Before DOOLING J—Motion for protective order. Ordered that no depositions at Downey or Schuck be taken but that documents be produced. tk

12-8-77 By Dooling, J.—Order dtd 12/8/77 directing clerk to withdraw from Registry sum of Two Hundred Fifty ($250) dollars and pay same to A.L. Washburn, Jr. as and for complete refund to moneys previously deposited in lieu of bond, filed. jm (see #96 of 76-C-1804)

12-27-77 Pltff's supp. answer to pltff's interroga. #3 filed in 76-C-1804 filed. fy

1-6-78 Before DOOLING, J.—Case called for hearing, motion to amend, no opposition, motion granted

2-9-78 Before DOOLING, J.—Case called for hearing and hearing resumed and cont to 2-14-78

2-14-78 Before DOOLING, J. Case called. Hearing resumed. MOTION by CATHOLIC LEAGUE, et al to intervene as party-defts ARGUED. MOTION DENIED except to the extend that petitioners may appeal as amici curiae. (SEE ORDER on BACK OF MOTION PAPERS) Hearing adjourned to 2/15/78.

2-16-78 Before Dooling, J.—Case called. Hearing resumed. Hearing adjourned to 2/17/78 @ 10.30 AM. jm

2-17-78 Before DOOLING, J—Case called. Hearing resumed. Hearing adj'd to 2-21-78. mg

DATE	PROCEEDINGS

2-23-78 Before DOOLING, J—Case called, Hearing resumed. Adj'd to 3-2-78. mg

3-2-78 Before DOOLING, J—Case called. Hearing resumed. Intervenor-deft's motion to strike testimony of certain of pltff's witnesses argued and denied. Hearing adj'd to 3-8-78. mg

3-7-78 Sten. transcript dtd 3-2-78 filed. See 76C 1805. mg

3-8-78 Before Dooling, J.—Case called. Hearing resumed. Hearing continued to 3/10/78 @ 10AM. jm.

3-10-78 Before Dooling, J.—Case called. Hearing resumed. Adjourned w/o date. jm

3-28-78 Before Dooling, J.—Case called. All parties present. Continued to 3/29/78 @ 10AM. jm

3-29-78 Before DOOLING, J—Case called. Hearing resumed. Hearing cont'd to 3-30-78. mg

4-3-78 By DOOLING, J.—Order dtd. 3-31-78 granting pltff leave to file a third amended complaint and a supp. complaint and granting leave for NYC to intervene as a pltff filed. fy

4-3-78 Amended complaint of pltff intervenor-pltff filed. fy

3-30-78 Before DOOLING, J—Case called for hearing, hearing resumed and cont 3-31-78

3-31-78 Before DOOLING, J.—Cace called for hearing, resumed, motion for leave to file third amended complaint is granted, motion by NYC to intervene as pltff granted

4-21-78 Before DOOLING, J.—Case called. Parties present. Deft's H.E.W. to answer interrogatories on or before May 15, 1978. Order signed. Adjourned without a date. ls

6-23-78 Before DOOLING, J.—case called for hearing, hearing resumed and ajd without date. fy

7-19-78 Certified copy of order received from court of appeals and filed dismissing appeal (in 76C1804 #124)

DATE	PROCEEDINGS

8-2-78 Before DOOLING, J.—Case called for hearing on motion to introduce pltffs evidence, all parties present. Hearing ordered and begun, hearing contd to 8-30-78. fy

8-3-78 Before DOOLING, J.—Case called for hearing on motion to introduce evidence of Pltff. Hearing resumed. Hearing concluded. Case adjourned to 8/28/78, at 10:00 am for Deft-intervenors case. deft's briefs due by 10/2/78. ls

8-14-78 Stenographers transcript dtd. 8-2-78 and 8-3-78 filed in 76C 1804 jc

9-6-78 Before Dooling, J.—Case called. All sides present. Hearing concluded. jm

9-11-78 Sten. transcript dtd. 9-6-78 filed in 76C 1804, doc. #144. fy

10-20-78 Letter dtd 10-16-78 from Ellen K. Sawyer to Judge Dooling re: pltff's position in this case being that taken in their Memorandum Of Law in 76 C 1804, filed. sk

12-8-78 Sten. transcript dtd. 12-4-78 filed. In 76 C 1804. fy

2-2-79 Sten. Transcript dtd 6/23/78. Filed in 76 C 1804, #204. ls

1-15-80 By DOOLING, J.—Memo and order for judgment that judgment must be entered for pltffs etc., filed in 76 C 1804, doc. #217.

1-15-80 Judgment dtd. 1-15-80 approved by J. Dooling that pltff is a qualified provider of medicaid services and provides medically necessary abortional services to medicaid eligible women, that deft continue to authorize the expenditure of federal matching funds for medically necessary abortions etc., see judgment, filed. fy

1-15-80 By DOOLING, J.—Order dtd. 1-15-80 staying enforcement of judgment for 30 days from 1-15-80 filed. fy

1-15-80 Notice of appeal filed by USA to Supreme Court. copies mailed to parties & Sup. Ct. fy

DATE	PROCEEDINGS
1-28-80	Notice of appeal filed to Sup. Ct., by intervenor-defts, copy mailed to Sup. Ct., filed in 76C 1804. fy
1-28-30	Deft-intervenors' aplication for extension of stay pending appeal, filed in 76C 1804. fy
1-31-80	Notice of motion ret. 2-4-80 with memo of law for an extension of the stay pending final determination of the appeal by the US Supreme Court filed in 76 C 1804. fy
2-25-80	Certified copy of order from Supreme Court denying application for stay and that probable jurisdiction is noted, etc., filed in 76C 1804. fy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76C 1804

CORA MCRAE, individually and on behalf of all others similarly situated, PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., individually and on behalf of all others similarly situated, PLAINTIFFS

v.

F. DAVID MATHEWS, Secretary, United States Department of Health, Education, and Welfare, DEFENDANT.

VERIFIED COMPLAINT
CLASS ACTION

I.

PRELIMINARY STATEMENT

1. This is a civil action for injunctive, declaratory and other relief. Plaintiffs seek (a) a declaration that an amendment ("the Hyde Amendment") to H.R. 14232 (popularly known as the HEW Appropriations Act for Fiscal 1976-77) enacted into law on September 30, 1976 is invalid under the United States Constitution and (b) an injunction against its implementation.

II.

JURISDICTION

2. This court has jurisdiction of the subject matter and parties to this cause by virtue of 28 U.S.C. Sections 1331, 1361, 2201 and 2202. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

3. This case arises under the Social Security Act, the Hyde Amendment, and the First, Fourth, Fifth and Ninth Amendments to the Constitution.

III.

PARTIES

4. Plaintiff Cora McRae is a 24 year old female citizen of the State of New York and the United States. Plaintiff McRae is in the first trimester of pregnancy and has made a decision in consultation with her physician to terminate her pregnancy. Plaintiff has no funds of her own with which to pay for an abortion and is financially dependent upon medical assistance (Medicaid) from the State of New York for all medical care. The defendant is prohibited by the Hyde Amendment from authorizing the expenditure of federal matching funds to pay for abortions requested by and/or performed upon women eligible for Medicaid including specifically the plaintiff.

5. Plaintiff PLANNED PARENTHOOD OF NEW YORK CITY, INC. ("PPNYC") is a § 501(c)(3) tax exempt, not-for-profit corporation incorporated in the State of New York which provides family planning services and first trimester abortion services at its state licensed clinics including one located in the eastern district of New York.

PPNYC provides an average of approximately 300 abortions per month for Medicaid eligible patients. Until the enactment of the Hyde Amendment, PPNYC was reimbursed by Medicaid for the abortions it performed on such patients. The Hyde Amendment prohibits reimbursement from federal funds for the performance of most abortions sought by PPNYC patients who are covered by Medicaid, including plaintiff McRae.

6. Plaintiff Irwin B. Teran, M.D. ("Dr. Teran") is a physician licensed to practice medicine in the State of New York who specializes in obstetrics and gynecology. His offices are at 757 Bushwick Avenue, Brooklyn, New York. Many of his patients are enrolled in the Medicaid

program and he is reimbursed for the full range of obstetrical and gynecological medical services he renders for them. The Hyde Amendment makes it impossible for him to be paid for the medically appropriate treatment of those of his Medicaid patients seeking abortions.

7. Defendant F. David Mathews is Secretary of the Department of Health, Education and Welfare ("HEW"), and as such is responsible for the overall operation and administration of the Department's programs, and for the expenditure of sums appropriated by the Congress for those programs, including Medicaid. He is sued in his official capacity.

IV.

CLASS ACTION ALLEGATIONS

CLASS OF WOMEN

8. Plaintiff McRae sues on her own behalf and on behalf of the entire class of pregnant or potentially pregnant women in the State of New York who are eligible for Medicaid, who with their physician have decided on abortions, for whom abortions are medically appropriate and who are prevented from obtaining medical termination of their pregnancies by the Hyde Amendment "hereinafter "class of women").

9. The action may be maintained as a class action on behalf of the class of women under Rule 23(b)(1)(B) and under Rule 23(b)(2): Under Rule 23(b)(1)(B) because the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; and under Rule 23(b)(2) because the parties opposing the class have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

10. The class of women is so numerous that joinder of all members is impractical.

11. Plaintiff McRae will fairly and adequately represent the interests of the class of women. Her attorneys include the general counsel to PPNYC and to the Planned Parenthood Federation of America, Inc., as well as other lawyers who have extensive experience in litigation involving human rights in the field of family planning and abortion. Plaintiff McRae and her attorneys are prepared to carry forward the claims of the representative party to final judgment and to protect the interests of all members of the class of women.

The questions of law and fact which Plaintiff McRae seeks to litigate, in particular the constitutionality of the Hyde Amendment, are common to the class she seeks to represent.

CLASS OF PHYSICIANS

12. Dr. Teran sues on his own behalf and on behalf of the entire class of duly licensed physicians and surgeons certified for participation in Medicaid and presently performing or desiring to perform the termination of pregnancies of members of the above class of women (hereinafter "class of physicians").

13. The action may be maintained as a class action on behalf of the class of physicians under Rule 23(b)(1)(B) and under Rule 23(b)(2): Under Rule 23(b)(1)(B) because the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; under Rule 23(b)(2) because the parties opposing the class have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

14. The class of physicians is so numerous that joinder of all members is impracticable.

15. Dr. Teran will fairly and adequately represent the interests of the class of physicians. His attorneys have extensive experience in litigation involving the rights of physicians to practice their profession in accordance with their best medical judgment, especially in the field of family planning and abortion. Dr. Teran and his counsel are prepared to carry his claims forward to final judgment and to protect the interests of all members of the class of physicians.

16. The questions of law and fact which Dr. Teran seeks to litigate, in particular the constitutionality of the Hyde Amendment, are common to the class he seeks to represent.

V.

THE MEDICAID PROGRAM

17. 42 U.S.C. Section 1396 *et seq.* (Title XIX of the Social Security Act), enacted by Congress in 1965, establishes the Medicaid program and authorizes appropriations to enable states to furnish medical assistance to families and individuals whose income and resources are insufficient to meet the costs of medical care and services.

18. New York State implemented the Medicaid program in 1966 by enacting Social Services Law, Article 5, Title 11, establishing a comprehensive program of medical assistance for needy persons. Abortions elected by indigent women upon the advice of duly licensed physicians within 24 weeks of the commencement of their pregnancies are covered by this program.

VI.

THE HYDE AMENDMENT

19. Prior to enactment of the Hyde Amendment, 50% of the cost of abortions performed upon patients in the Eastern District of New York entitled to Medicaid coverage was unconditionally reimbursed from federal funds.

20. The Hyde Amendment provides:

"None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

21. The House and Senate Conference Committee with respect to the Hyde Amendment issued a Conference Report (attached hereto and made a part hereof as "Exhibit A") which sets forth certain limited circumstances under which the Committee believes Federal funds may be used to pay for abortions.

22. Under the Hyde Amendment, the defendant Mathews is prohibiting from expending funds to pay for abortions except as stated in paragraph 20 and possibly paragraph 21.

23. As a result of the Hyde Amendment, the plaintiffs and the members of the classes they represent are subjected to immediate and irreparable harm, namely:

(a) Plaintiff McRae has been refused an abortion and believes that others will be similarly refused and that she and the members of the plaintiff class of women will be unable to obtain the abortions they desire without the relief sought in this complaint.

(b) Dr. Teran and members of the class of doctors are not able to afford to perform such abortions without reimbursement and have refused and must continue to refuse this treatment.

(c) Plaintiff PPNYC has announced that beginning October 1st it will refuse to serve Medicaid eligible women who seek abortions and who are unable to pay for them. Plaintiff PPNYC is financially unable to serve such women unless it is assured that Medicaid reimbursement will be forthcoming.

VII.

FIRST CAUSE OF ACTION

24. The Medicaid program in New York State routinely pays with federal, state and city funds the full reasonable costs of all pregnancy related care and services for those eligible women who choose to carry pregnancy to term.

25. Under Title XIX of the Social Security Act, defendant Mathews routinely authorizes reimbursement of a substantial percentage of the cost of all pregnancy related care and services for Medicaid eligible women who choose to carry their pregnancies to term.

26. Under the Hyde Amendment, defendant Mathews is forbidden to reimburse for any portion of the cost of abortion services for most eligible women, including the plaintiff McRae, who choose to terminate their pregnancies by abortion, thus creating an invidious classification which denies to plaintiff and to the class of women the due process and equal protection of the laws guaranteed by the First Amendment to the Constitution.

VIII.

SECOND CAUSE OF ACTION

27. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 26 as though fully set forth herein and further allege as follows:

28. Defendant's denial of federal funds for reimbursement for abortions as a means of terminating pregnancy deprives plaintiff McRae and the class of women of their right to control their own persons, and to privacy and liberty in matters relating to marriage, sex, procreation and the family, all in violation of the Fourth, Fifth and Ninth Amendments to the Constitution.

IX.

THIRD CAUSE OF ACTION

29. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 28 as though fully set forth herein and further allege as follows:

30. Pregnant women who can pay the necessary costs of abortion services can obtain such services during the first two trimesters of pregnancy in New York State.

31. By denying reimbursement for abortion services to Medicaid recipients, defendant has created an invidious classification which denies to the plaintiff McRae and to plaintiff class of women the due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

X.

FOURTH CAUSE OF ACTION

32. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 31 as though fully set forth herein and further allege as follows:

33. Under Title XIX of the Social Security Act, the Federal government provides matching funds which together with state funds pay the full cost of sterilization operations for Medicaid eligible women.

34. By denying payment for abortion services to Medicaid eligible women, the defendant coerces women who do not want at present to bear a child to carry their pregnancies to term, resort to self-abortion or other high risk alternatives or to be irreversibly sterilized rather than risk a pregnancy which cannot be aborted, all in violation of the due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

XI.

FIFTH CAUSE OF ACTION

35. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 34 as though fully set forth herein and further allege as follows:

36. Many pregnant women including plaintiff McRae have consulted and will continue to consult Dr. Teran and the class of physicians. For many such women, including plaintiff McRae such physicians would, in the exercise of their best professional judgment, concur in the women's decisions to choose abortion and would perform the abortions sought by such women.

37. Defendant's prohibition of reimbursement to Dr. Teran and members of his class for abortions performed upon Medicaid patients who request them deprives Dr. Teran and plaintiff class of physicians of the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

38. The Hyde Amendment infringes upon the right of Dr. Teran and plaintiff class of physicians to give and their patients' right to receive appropriate and adequate medical treatment and advice pertaining to the decision whether to terminate a given pregnancy, in violation of the First, Fourth, Fifth and Ninth Amendments to the Constitution.

39. Prohibition of reimbursement by the defendant deprives Dr. Teran and plaintiff class of physicians of substantial income from abortion services normally rendered to Medicaid eligible women, in violation of the right of Dr. Teran and the class of physicians to render medical services and to receive fees for such services, all without due process of law, in violation of the Fifth Amendment to the Constitution.

XII.

SIXTH CAUSE OF ACTION

40. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 39 as though fully set forth herein and further allege as follows:

41. Many pregnant women have come and will continue to come to PPNYC for abortion services by physicians performing abortions in PPNYC clinics. Denial of reimbursement for abortions for Medicaid eligible women would prevent PPNYC from continuing its program of such medical services and from receiving fees for such services, all without due process of law in violation of the Fifth Amendment to the Constitution.

XIII.

SEVENTH CAUSE OF ACTION

42. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 41 as though fully set forth herein and further allege as follows:

43. The intent and effect of the Hyde Amendment is to force indigent women to carry their pregnancies to term in violation of their constitutionally protected right to privacy.

44. One of the principal grounds stated by Congress for the enactment of the Hyde Amendment is that the use of federal funds for abortion offends the religious beliefs of certain segments of the population.

45. The Hyde Amendment constitutes an establishment of religion in violation of the First Amendment to the Constitution. No secular justification for the restriction has been advanced.

WHEREFORE, Plaintiffs pray:

1. That this court declare that the Hyde Amendment is null and void because it violates the Constitution of the United States.

2. That this court enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant, his successors in office, agents and employees, and all other persons in active concert and participation with him, from refusing to pay federal matching funds (at the proportionate level and in accord with the standards under which they were being paid before the Hyde Amendment was enacted) for abortions provided to women eligible for Medicaid.

3. That this court render its judgment ordering the defendant to continue to pay federal matching funds for abortions provided to women eligible for Medicaid.

4. That this court award plaintiffs their costs herein and grant them such other further relief as this court may deem just, proper and equitable.

Dated: September 30, 1976

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022
Telephone No. (212) 758-4010

By: /s/ Harriet F. Pilpel
HARRIET F. PILPEL
FREDERIC S. NATHAN
LAURENCE VOGEL
EVE W. PAUL
Attorneys for Plaintiff Planned Parenthood of New York City, Inc.

SYLVIA A. LAW
40 Washington Square South
New York, New York 10022
Telephone No. (212) 598-7642

RHONDA COPELON
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003
Telephone No. (212) 674-3303

JILL LAURIE GOODMAN
ELLEN LEITZER
JUDITH MEARS
NADINE TAUB
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
Telephone No. (212) 725-1222

By: _____

Attorneys for Women and Doctor Plaintiffs

Of Counsel:

Representative Bella Abzug
252 Seventh Avenue
New York, New York 10001
Telephone No. (212) 620-6701

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALFRED F. MORAN, being duly sworn, deposes and says that he resides at 90 Springhurst Road, Bedford Hils, New York; that he is the Executive Vice President of PLANNED PARENTHOOD OF NEW YORK CITY, INC., one of the plaintiffs herein; and that he has read the foregoing verified complaint and knows the contents thereof and to the best of his knowledge the same are true except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

ALFRED F. MORAN

Sworn to before me this
day of October, 1976

Notary Public

EXHIBIT A

answered "present" 1, not voting 37, as follows:

[Roll No. 734]

YEAS—324

	Foley	Moffett
	Ford, Mich.	Mollohan
	Fountain	Moorhead, Pa.
	Fraser	Morgan
	Frenzel	Mosher
	Frey	Moss
	Fuqua	Murphy, Ill.
	Gaydos	Murphy, N.Y.
	Gialmo	Murtha
	Gibbons	Myers, Ind.
	Gilman	Natcher
	Ginn	Nedzi
	Goldwater	Nichols
	Gonzalez	Nix
	Grasso	Nowak
	Gray	Oberstar
	Green	Obey
	Grover	O'Brien
	Gude	O'Hara
	Hagedorn	O'Neill
	Hall, Ill.	Passman
	Hamilton	Patten, N.J.
	Hanley	Patterson,
	Hannaford	Calif.
	Harkin	Patterson, N.Y.
	Harrington	Pepper
	Harris	Perkins
	Hawkins	Pettis
	Hays, Ind.	Pickle
	Hechler, W. Va.	Pike
	Heckler, Mass.	Pressler
	Heftel	Preyer
	Hicks	Price
	Hightower	Pritchard
	Hillis	Quie
	Holland	Railsback
	Holtzman	Rangel
	Horton	Rees
	Howard	Regula
	Hughes	Reuss
	Hungate	Richmond
	Hutchinson	Roberts
	Ichord	Rodino
	Jacobs	Roe
	Jarman	Rogers
	Jeffords	Roncalio
	Jenrette	Rooney
	Johnson, Calif.	Rose
	Johnson, Colo.	Rosenthal
	Johnson, Pa.	Rostenkowski
	Jones, Ala.	Roush
	Jones, N.C.	Roybal
	Jones, Okla.	Ryan
	Jordan	St Germain
	Kasten	Santini
	Kastenmeier	Sarasin
	Kelly	Sarbanes
	Keys	Scheuer
	Koch	Schneebeli
	Krebs	Schroeder
	LaFalce	Schulze
	Lagomarsino	Sebelius
	Latta	Seiberling
	Leggett	Sharp
	Lehman	Shipley
	Lent	Shriver
	Levitas	Sikes
	Lloyd, Calif.	Simon
	Long, La.	Sisk
	Long, Md.	Skubitz
	Lujan	Slack
	Lundine	Smith, Iowa
	McCloskey	Smith, Nebr.
	McCormack	Solarz
	McDade	Spellman
	McFall	Spence
	McIntyre	Staggers
	McKay	Stanton,
	McKinney	J. William
	Madden	Stanton,
	Madigan	James V.
	Mann	Stark
	Martin	Steed
	Mathis	Steiger, Wis.
	Matsunaga	Stokes
	Mazzoli	Stratton
	Meeds	Studds
	Melcher	Sullivan
	Metcalfe	Symington
	Meyner	Talcott
	Mezvinsky	Taylor, N.C.
	Michel	Teague
	Mikva	Thompson
	Milford	Thone
	Miller, Calif.	Thornton
	Miller, Ohio	Traxler
	Mills	Treen
	Mineta	Tsongas
	Minish	Udall
	Mink	Ullman
	Mitchell, Md.	Van Deerlin
	Mitchell, N.Y.	Vander Veen
	Moakley	Vanik
	Vigorito	Wilson, Bob
	Walsh	Wilson, C. H.
	Wampler	Wilson, Tex.
	Weaver	Winn
	Whalen	Wirth
	White	Wolff
	Whitehurst	Wright
	Wiggins	Wydler
		Wylie
		Yates
		Yatron
		Young, Alaska
		Young, Fla.
		Young, Ga.
		Zablocki
		Zeferetti

NAYS—68

Abdnor	Hammer-	Myers, Pa.
Archer	schmidt	Ottinger
Ashbrook	Henderson	Paul
Bauman	Holt	Poage
Beard, Tenn.	Hubbard	Quillen
Breaux	Hutchinson	Randall
Broyhill	Ichord	Rhodes
Burleson, Tex.	Jones, Tenn.	Robinson
Burlison, Mo.	Kazen	Rousselot
Butler	Kemp	Runnels
Byron	Ketchum	Ruppe
Chappell	Kindness	Satterfield
Clancy	Krueger	Shuster
Clawson, Del	Lloyd, Tenn.	Snyder
Cochran	Lott	Steiger, Ariz.
Collins, Tex.	McDonald	Symms
Crane	McEwen	Taylor, Mo.
Daniel, Dan	Maguire	Treen
Daniel, R. W.	Mahon	Waggonner
de la Garza	Montgomery	Waxman
Devine	Moore	Whitten
Evins, Tenn.	Moorhead,	Young, Tex.
Goodling	Calif.	
Hall, Tex.	Mottl	

ANSWERED "PRESENT"—1

Bafalis

NOT VOTING—37

Allen	Forsythe	Neal
AuCoin	Green	Nolan
Beard, R.I.	Haley	Peyser
Bergland	Hansen	Riegle
Bowen	Hébert	Rinaldo
Carter	Heinz	Risenhoover
Chisholm	Helstoski	Russo
Collins, Ill.	Hinshaw	Steelman
Conlan	Howe	Stephens
Erlenborn	Karth	Stuckey
Esch	Landrum	Vander Jagt
Evans, Colo.	McCollister	
Ford, Tenn.	Matsunaga	

The Clerk announced the following pairs:

Mr. Evans of Colorado with Mr. Bowen.
Mr. AuCoin with Mr. Hébert.
Mr. Bergland with Mr. Landrum.
Mr. Beard of Rhode Island with Mr. Conlan.
Mr. Helstoski with Mr. Hansen.
Mr. Neal with Mr. McCollister.
Mr. Russo with Mr. Rinaldo.
Mr. Risenhoover with Mr. Erlenborn.
Mr. Nolan with Mr. Carter.
Mr. Riegle with Mr. Steelman.
Mr. Esch with Mr. Stuckey.
Mr. Green with Mr. Matsunaga.
Mrs. Chisholm with Mr. Peyser.
Mr. Vander Jagt with Mr. Howe.
Mrs. Collins of Illinois with Mr. Ford of Tennessee.
Mr. Forsythe with Mr. Stephens.
Mr. Heinz with Mr. Haley.
Mr. Allen with Mr. Karth.

Mr. MOFFETT changed his vote from "nay" to "yea."

Messrs. RHODES, BUTLER, YOUNG of Texas, and KEMP changed their votes from "yea" to "nay."

So the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. ROGERS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks and include extraneous material on the bill, H.R. 10493, just passed.

The SPEAKER. Is there objection to the request of the gentleman from Florida?

There was no objection.

REQUEST FOR CONSIDERATION OF S. 3219

Mr. ROGERS. Mr. Speaker, I ask unanimous consent for the immediate consideration of the Senate bill (S. 3219) to amend the Clean Air Act, as amended.

The Clerk read the title of the Senate bill.

The SPEAKER. Is there objection to the request of the gentleman from Florida?

Mr. ROUSSELOT. Mr. Speaker, I object.

The SPEAKER. Objection is heard.

CONFERENCE REPORT ON H.R. 14232. MAKING APPROPRIATIONS FOR DEPARTMENTS OF LABOR, HEW, AND RELATED AGENCIES

Mr. FLOOD submitted the following conference report and statement on the bill (H.R. 14232) making appropriations for the Departments of Labor, Health, Education, and Welfare, and related agencies for the fiscal year ending September 30, 1977, and for other purposes:

CONFERENCE REPORT (H. REPT. No. 94-1555)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 68 to the bill (H.R. 14232) "making appropriations for the Departments of Labor and Health, Education, and Welfare, and Related Agencies for the fiscal year ending September 30, 1977, and for other purposes," having met, after further full and free conference, have been unable to agree.

DANIEL J. FLOOD,
NEAL SMITH,
EDWARD J. PATTEN,
DAVID R. OBEY,
EDWARD R. ROYBAL,
JOSEPH D. EARLY,
GEORGE MAHON,
ROBERT H. MICHEL,
GARNER E. SHRIVER,
SILVIO O. CONTE,
ELFORD A. CEDERBERG,
Managers on the Part of the House.

WARREN G. MAGNUSON,
JOHN C. STENNIS,
ROBERT C. BYRD,
WILLIAM PROXMIRE,
JOSEPH M. MONTOYA,
ERNEST F. HOLLINGS,
THOMAS F. EAGLETON,
BIRCH BAYH,
LAWTON CHILES,
JOHN L. MCCLELLAN,
EDWARD W. BROOKE,
CLIFFORD P. CASE,
HIRAM L. FONG,
TED STEVENS,
RICHARD S. SCHWEIKER,
MILTON R. YOUNG,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the further conference on the disagreeing votes of the two Houses on the amendment of the Senate numbered 68 to the bill (H.R. 14232) making appropriations for the Departments of Labor, and Health, Education, and Welfare, and related agencies for the fiscal year ending September 30, 1977, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

BEST COPY AVAILABLE

TITLE II—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

General provisions

Amendment No. 68: Reported in technical disagreement. The managers on the part of the House will offer a motion as follows:

Restore the matter stricken by said amendment amended to read as follows:

"SEC. 209. None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

Section 209 of the House bill contained a prohibition against the use of funds contained in this Act to pay for or to promote or encourage abortions. The Senate bill deleted this provision.

Having met in further conference, agreement has been reached on the issue of whether or not Federal funds may be used to finance abortions. Most certainly, this is a difficult, emotionally-charged issue—one which many believe should be dealt with by the appropriate legislative committees.

Nevertheless, in an effort to resolve this issue and avoid further delay in meeting the vital needs addressed by programs in this bill, a majority of the Conferees have agreed to a modification of the House bill language.

It is the intent of the Conferees to limit the financing of abortions under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions as a method of family planning, or for emotional or social convenience. It is not our intent to preclude payment for abortions when the life of the woman is clearly endangered, as in the case of multiple sclerosis or renal disease, if the pregnancy were carried to term. Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum.

Furthermore, the proposed language would not interfere with or limit Federal aid to medical schools conducting research into, or teaching of, abortion procedures for therapeutic purposes.

The Congress is aware that there are three cases related to this issue to be heard by the Supreme Court this fall, and wishes to make clear that the Congress in its action upon this particular appropriations bill does not intend to prejudge any constitutional questions involved in these cases.

The managers on the part of the Senate will move to concur in the amendment of the House to the amendment of the Senate.

DANIEL J. FLOOD,
NEAL SMITH,
EDWARD J. PATTEN,
DAVID R. OBEY,
EDWARD R. ROYBAL,
JOSEPH D. EARLY,
GEORGE MAHON,
ROBERT H. MICHEL,
GARNER E. SHRIVER,
SILVIO O. CONTE,
ELFORD A. CEDERBERG,
Managers on the Part of the House.

WARREN G. MAGNUSON,
JOHN C. STENNIS,
ROBERT C. BYRD,
WILLIAM PROXMIRE,
JOSEPH M. MONTOYA,
ERNEST F. HOLLINGS,
THOMAS F. EAGLETON,
BIRCH BAYH,
LAWTON CHILES,
JOHN L. MCCLELLAN,
EDWARD W. BROOKE,
CLIFFORD P. CASE,
HIRAM L. FONG,
TED STEVENS,
DICK SCHWEIKER,
MILTON R. YOUNG,
Managers on the Part of the Senate.

REQUEST FOR PERMISSION TO CONSIDER CONFERENCE REPORT ON H.R. 14232 ON FRIDAY, SEPTEMBER 17, 1976

Mr. FLOOD. Mr. Speaker, I ask unanimous consent that it be in order to consider in the House on Friday, September 17, 1976, the conference report on H.R. 14232, making appropriations for the Departments of Labor, Health, Education, and Welfare and related agencies for the fiscal year ending September 30, 1977, and for other purposes.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

Mr. ROUSSELOT. Mr. Speaker, reserving the right to object, I will yield to the gentleman from Maryland (Mr. BAUMAN).

Mr. BAUMAN. Mr. Speaker, could I ask the gentleman from Pennsylvania if it is his intention to bring up the conference report on Friday? This does include the Hyde amendment, which is the subject of some interest.

Mr. FLOOD. It is just a conference report. Actually, we get the Hyde amendment, which is Senate amendment No. 68 in disagreement.

Mr. BAUMAN. It will be brought up on Friday?

Mr. FLOOD. As I understand, yes. That is my purpose in making the request.

Mr. ROUSSELOT. Further reserving the right to object, my understanding is that this was originally scheduled for Monday. Can the gentleman tell us why we have moved it up?

Mr. FLOOD. I did not know it was originally scheduled for Monday. I did not know that.

Mr. ROUSSELOT. Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

Mr. CLANCY. Mr. Speaker, reserving the right to object, would the chairman advise us as to why this matter was decided to be brought up on Friday?

Mr. FLOOD. I do not know. I talked to the leadership on both sides.

Mr. CLANCY. Mr. Speaker, I object.

The SPEAKER. Objection is heard.

CONFERENCE REPORT ON H.R. 13035, SEA GRANT PROGRAM IMPROVEMENT ACT OF 1976

Mr. BREAUX (on behalf of Mrs. SULLIVAN) filed the following conference report and statement on the bill (H.R. 13035) to amend the National Sea Grant College and Program Act of 1966:

CONFERENCE REPORT (H. REPT. No. 94-1556)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 13035) to amend the National Sea Grant College and Program Act of 1966, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Sea Grant Program Improvement Act of 1976".

SEC. 2. AMENDMENT TO THE NATIONAL SEA GRANT COLLEGE AND PROGRAM ACT OF 1966.

Title II of the Marine Resources and Engineering Development Act of 1966 (33 U.S.C. 1101 et seq.) is amended to read as follows:

"TITLE II—NATIONAL SEA GRANT PROGRAM

"SEC. 201. SHORT TITLE.

"This title may be cited as the 'National Sea Grant Program Act'.

"SEC. 202. DECLARATION OF POLICY.

"(a) FINDINGS.—The Congress finds and declares the following:

"(1) The vitality of the Nation and the quality of life of its citizens depend increasingly on the understanding, assessment, development, utilization, and conservation of ocean and coastal resources. These resources supply food, energy, and minerals and contribute to human health, the quality of the environment, national security, and the enhancement of commerce.

"(2) The understanding, assessment, development, utilization, and conservation of such resources require a broad commitment and an intense involvement on the part of the Federal Government in continuing partnership with State and local governments, private industry, universities, organizations, and individuals concerned with or affected by ocean and coastal resources.

"(3) The National Oceanic and Atmospheric Administration, through the national sea grant program, offers the most suitable locus and means for such commitment and involvement through the promotion of activities that will result in greater such understanding, assessment, development, utilization, and conservation. Continued and increased Federal support of the establishment, development, and operation of programs and projects by sea grant colleges, sea grant regional consortia, institutions of higher education, institutes, laboratories, and other appropriate public and private entities is the most cost-effective way to promote such activities.

(b) OBJECTIVE.—The objective of this title is to increase the understanding, assessment, development, utilization, and conservation of the Nation's ocean and coastal resources by providing assistance to promote a strong educational base, responsive research and training activities, and broad and prompt dissemination of knowledge and techniques.

"(c) PURPOSE.—It is the purpose of the Congress to achieve the objective of this title by extending and strengthening the national sea grant program, initially established in 1966, to promote research, education, training, and advisory service activities in fields related to ocean and coastal resources.

"SEC. 203. DEFINITIONS.

"As used in this title—

"(1) The term 'Administration' means the National Oceanic and Atmospheric Administration.

"(2) The term 'Administrator' means the Administrator of the National Oceanic and Atmospheric Administration.

"(3) The term 'Director' means the Director of the national sea grant program, appointed pursuant to section 204(b).

"(4) The term 'field related to ocean and coastal resources' means any discipline or field (including marine science (and the physical, natural, and biological sciences, and engineering, included therein), marine technology, education, economics, sociology, communications, planning, law, international affairs, and public administration) which is concerned with or likely to improve the understanding, assessment, development, utilization, or conservation of ocean and coastal resources.

"(5) The term 'includes' and variants thereof should be read as if the phrase 'but is not limited to' were also set forth.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1805

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PLAINTIFF

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT

VERIFIED COMPLAINT

PRELIMINARY STATEMENT

1. This is a civil action for injunctive, declaratory and other relief. Plaintiff seeks (a) a declaration that an amendment ("the Hyde Amendment") to HR 14232 Bill (popularly known as the HEW Appropriations Act for Fiscal 1976-77), which prohibits any of the funds appropriated therein from being used to perform abortions except where the life of the mother would be endangered if the fetus were carried to full term, and which was enacted into law on September 30, 1976 is invalid under the United States Constitution and (b) an injunction against its implementation.

JURISDICTION

2. Jurisdiction of the subject matter and the parties to this action is conferred upon this Court by 28 U.S.C. 1331, 1361, 2201, and 2202. The amount in controversy, exclusive of interests and costs, exceeds $10,000.

PARTIES

3. The New York City Health and Hospitals Corporation (hereinafter the "Corporation") is a public benefit corporation, organized pursuant to Section 7381, *et seq.* of the Unconsolidated Laws of New York, and charged with the duty of providing high quality, dignified and comprehensive health and medical services and with operating municipal health facilities in order to protect and promote the health, welfare and safety of the people of the City of New York, particularly those who can least afford such services. The Corporation presently operates 16 municipal hospitals, three Neighborhood Family Care Centers, and other health care facilities.

4. Twelve of the municipal hospitals perform abortions. The entire municipal hospital system provided a total of 10,324 abortions in 1974 for Medicaid eligible patients. (Statistics for 1975 and 1976 are not yet available.) Until the enactment of the Hyde Amendment, the municipal hospitals administered by the Corporation were reimbursed by Medicaid for the abortions they performed on such patients. The Hyde Amendment prohibits reimbursement from federal funds for the performance of most abortions sought by municipal hospital patients who are covered by Medicaid.

5. Defendant F. David Mathews is Secretary of the Department of Health, Education and Welfare ("HEW"), and as such is responsible for the overall operation and administration of the Department's programs, and for the expenditure of sums appropriate by the Congress for those programs, including Medicaid. He is sued in his official capacity.

THE MEDICAID PROGRAM

6. 42 U.S.C. Section 1396 *et seq.* (Title XIX of the Social Security Act), enacted by Congress in 1965, established the Medicaid program and authorizes appropriations to enable states to furnish medical assistance to families and individuals whose income and resources are insufficient to meet the costs of medical care and services

7. New York State implemented the Medicaid program in 1966 by enacting Social Services Law, Article 5, Title 11, establishing a comprehensive program of medical assistance for needy persons. Abortions elected by indigent women upon the advice of duly licensed physicians within 24 weeks of the commencement of their pregnancies are covered by this program.

THE HYDE AMENDMENT

8. Prior to enactment of the Hyde Amendment, 50% of the cost of abortions performed upon Medicaid eligible patients treated at plaintiff's hospitals was unconditionally reimbursed from federal funds.

9. On September 30, 1976, Congress enacted into law the Hyde Amendment, which was attached as a Rider (Section 209) to H.R. 14232, the HEW Appropriations Bill for fiscal year 1977 (October 1, 1976 to September 30, 1977). The Hyde Amendment provides:

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

10. The House and Senate Conference Committee with respect to the Hyde Amendment issued a Conference Report (attached to the complaint filed today in the companion case entitled McRae v. Mathews, 76 Civ. [E.D.N.Y.]) which sets forth additional limited circumstances under which federal funds may be used to pay for abortions. These circumstances are limited to when the pregnancy is the result of rape or incest.

11. Under the Hyde Amendment, the defendant Mathews is prohibited from expending federal funds to pay for abortions except as stated in paragraphs 9 and 10.

12. Without these federal matching moneys to pay for abortions, states will have two alternatives: to assume the total cost of each abortion performed upon patients entitled to Medicaid coverage or to refuse to pay for any such abortion.

13. There is an outstanding directive from this Court to the New York State Commissioner of Social Services prohibiting him from refusing Medicaid reimbursement under Section 365-a of the Social Services Law for lawful abortional acts to indigent women who otherwise qualify for medical assistance under that statute and its regulations. *Klein* v. *Nassau County Medical Center*, 409 F. Supp. 731 (three judge court, E.D.N.Y., 1976), appeal docketed No. 75-1749 (May 27, 1976).

14. Upon information and belief, New York State will refuse to pay the Corporation for any such abortions due to the enormous expense involved and the State's traditional financial dependence upon federal moneys to fund Medicaid coverage for all eligible state recipients. Without the matching federal funds, New York State will be unwilling to fulfill its constitutional obligation to provide medical assistance to indigent women seeking elective abortions in the first two trimesters of pregnancy.

15. As a result of the Hyde Amendment, plaintiff Corporation is subjected to immediate and irreparable harm, namely:

(a) The Corporation will suffer an immediate and direct financial loss amounting to full cost or at least 50% of the two million dollars which it now receives as reimbursement for abortions performed in its municipal hospitals. Further, the Corporation will be forced to assume costs amounting to an estimated six million dollars from the shift of Medicaid patients seeking abortions from clinics and private hospitals to the municipal hospitals.

(b) Planned Parenthood of New York City, a New York State not-for-profit corporation which provides family planning services and first trimester abortion services at its licensed clinics, has announced that beginning October 1, 1976 it will refuse to service Medicaid eligible women who seek abortions and who are unable to pay for them. See complaint filed today in companion case of McRae v. Mathews, 76 Civ. (E.D.N.Y.). Upon information and belief, other clinics, physicians, and the proprietary and voluntary hospital will also immediately discontinue provision of abortion services to indigent women. Predictably, the Corporation's hospitals will be asked to provide care to a large number of indigent women no longer able to obtain abortions from these clinics, physicians, proprietary and voluntary hospitals. Unless the relief requested herein is granted, this increasing demand for services at the Corporation's facilities is to borne without help from Medicaid and during a time of severe financial crisis within the municipal hospital system and the entire City. The Corporation will eventually be forced severely to curtail its abortion and/or other medical services. The inevitable result will be delays in the scheduling of abortions and necessarily increased risks to women. The delays will prevent many women from obtaining an abortion at all.

(c) The Corporation will have to bear the immediate increased administrative costs of instituting procedures to identify those abortions in which Medicaid reimbursement may be available because of the threat to the life of the mother or because the pregnancy is the result of incest or rape.

(d) If the Corporation does not have sufficient funds to fulfill its statutory purpose to render quality health care to its indigent female patients who seek elective abortions in the first two trimesters of pregnancy, then it is likely there will be unfortunate social consequences, including a substantial increase in the number of unsafe and illegal abortions performed elsewhere, the birth of unwanted children, some of whom will ultimately become public charges, and increasing illegitimacy and child abuse.

FIRST CAUSE OF ACTION

16. Many pregnant women have sought and will continue to seek abortions in the Corporation's hospitals. For many such women, the physicians in the municipal hospitals would, in the exercise of their best professional judgment, recommend and perform the abortions sought by such women.

17. Defendant's denial of reimbursement to the Corporation for abortions performed upon Medicaid women

who request them unreasonably interferes with the freedom of the Corporation to render that comprehensive and high quality medical care pursuant to its statutory powers and purposes, in violation of due process of law as guaranteed by the Fifth Amendment to the U.S. Constitution.

SECOND CAUSE OF ACTION

18. Plaintiff repeats and realleges all the allegations of paragraph 1 through 17 as though fully set forth herein and further alleges as follows:

19. Public hospitals with obstetric and gynecology services have a duty under the law to provide first and second trimester abortions for women desirous of receiving them.

20. Proprietary and voluntary hospitals have no duty to provide abortions or any other services for which they are not reimbursed.

21. The defendant unfairly disfavors public hospitals and discriminates against the Corporation by withdrawing Medicaid reimbursement for abortion services that the municipal hospitals, unlike the proprietary and voluntary hospitals, are obligated to provide, thus requiring only public hospitals to perform services without fees in violation of the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

THIRD CAUSE OF ACTION

22. Plaintiff repeats and realleges all the allegations of paragraph 1 through 21 as though fully set forth herein and further alleges as follows:

23. Denial of reimbursement by the defendant deprives the Corporation of substantial income from abortion services normally rendered to Medicaid eligible women in violation of the right of the Corporation to render medical services and to receive fees for such services, all without due process of law, in violation of the Fifth Amendment to the Constitution.

FOURTH CAUSE OF ACTION

24. Plaintiff repeats and realleges all the allegations of paragraphs 1 through 23 as though fully set forth herein and further alleges as follows:

25. The Hyde Amendment infringes upon the Corporation's right to give and its patient population's right to receive safe and adequate medical treatment and advice pertaining to the decision whether to terminate a given pregnancy, in violation of the First, Fourth, Fifth and Ninth Amendments to the Constitution.

FIFTH CAUSE OF ACTION

26. Plaintiff repeats and realleges all the allegations of paragraphs 1 through 25 as though fully set forth herein and further alleges as follows:

27. Under the Medicaid program, the Federal government provides 90% reimbursement for funding sterilizations, which together with state funds pays the full cost of sterilization operations for Medicaid eligible women.

28. By denying payment for abortion services to Medicaid eligible women, the defendant coerces those indigent women who form part of the population to be served by the Corporation and who do not want at present to bear a child to be irreversibly sterilized rather than risk a pregnancy which cannot be aborted, all in violation of the due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

SIXTH CAUSE OF ACTION

29. Plaintiff repeats and realleges all the allegations of paragraph 1 through 28 as though fully set forth herein and alleges as follows:

30. The Medicaid program in New York State routinely pays with federal, state and city funds the full reasonable costs of all pregnancy related care and services for those eligible women who choose to carry pregnancy to term.

31. Under the Hyde Amendment, defendant Mathews is forbidden to reimburse for any portion of the cost of abortion services for most Medicaid eligible women who choose to terminate their pregnancies by abortion, thus creating an invidious classification which denies to the class of women, mainly minority, served by the Corporation in its municipal hospitals the due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

SEVENTH CAUSE OF ACTION

32. Plaintiff repeats and realleges all the allegations of paragraphs 1 through 31 as though fully set forth herein and further alleges as follows:

33. Defendant's denial of federal funds for reimbursement for abortions as a means of terminating pregnancy deprives the class of women, mainly minority, served by the Corporation in its municipal hospitals of their fundamental right to decide whether to bear a child, and to privacy and liberty in matters relating to marriage, sex, procreation and the family, all in violation of the Fourth, Fifth and Ninth Amendments to the Constitution.

EIGHTH CAUSE OF ACTION

34. Plaintiff repeats and realleges all the allegations of paragraphs 1 through 33 as though fully set forth herein and further alleges as follows:

35. Pregnant women who can pay the necessary costs of abortion services can obtain such services during the first two trimesters of pregnancy in New York State.

36. By denying reimbursement for abortion services to Medicaid recipients, defendant has created an invidious classification which denies to the class of women, mainly minority, served by the Corporation in its municipal hospitals the due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution.

NINTH CAUSE OF ACTION

37. Plaintiff repeats and realleges all the allegations of paragraphs 1 through 36 as though fully set forth herein and further alleges as follows:

38. The intent and effect of the Hyde Amendment is to force indigent women to carry their pregnancies to term in violation of their constitutionally protected right to privacy.

39. One of the principal grounds stated by Congress for the enactment of the Hyde Amendment is that the use of federal funds for abortion offends the religious beliefs of certain segments of the population.

40. The Hyde Amendment constitutes an establishment of religion in violation of the First Amendment to the Constitution.

RELIEF REQUESTED

WHEREFORE, plaintiff prays that the Court:

1. Assume jurisdiction of this cause pursuant to 28 U.S.C. 1331, 1361, 2201 and 2202.

2. Pending a hearing on the merits, grant a temporary restraining order, enjoining and restraining the defendant, his successors in office, agents and employees, and all persons in active concert and participation with him, from refusing to pay federal matching funds (at the proportionate level they were being paid before the Hyde Amendment was enacted) for abortions provided to women eligible for Medicaid.

3. Declare that the Hyde Amendment is null and void on the ground that it is unconstitutional on its face, and as applied, and enter a final judgment declaring that defendant's refusal to pay federal matching funds for abortions provided to women eligible for Medicaid violates the Constitution of the United States.

4. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining and restraining the defendant, his successors in office, agents and employees, and all other persons in ac-

tive concert and participation with him, from refusing to pay federal matching funds (at the proportionate level they were being paid before the Hyde Amendment was enacted) for abortions provided to women eligible for Medicaid.

5. Award plaintiff its costs and disbursements in this action and grant it such other and further relief as this Court may deem just, proper and equitable.

Dated: New York, New York

October 1, 1976

W. BERNARD RICHLAND
Corporation Counsel

By: /s/ James G. Greilsheimer
JAMES G. GREILSHEIMER
Litigating Assistant
Corporation Counsel

/s/ Ellen K. Sawyer
ELLEN K. SAWYER
Assistant Corporation
Counsel

Office and P.O. Address
Municipal Building
New York, New York 10007
Tel. 566-5500 or 2197

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

Dr. JOHN L. S. HOLLOMAN, Jr. being duly sworn, says that he is President of the New York City Health and Hospitals Corporation, plaintiff herein. That the foregoing complaint is true to his knowledge except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the grounds of his belief as to all matters not therein stated upon his own knowledge are as follows: Information obtained from books and records of the New York City Health and Hospitals Corporation and from statements made to him by certain officers or agents of the aforesaid Corporation.

/s/ John L. S. Holloman, Jr.
DR. JOHN L. S. HOLLOMAN, JR.

Sworn to before me this
30th day of September, 1976

/s/ Sidney Schutz
SIDNEY SCHUTZ
Notary Public, State of New York
Qualified in Bronx County
Registration No. 8864475
Term Expires March 30, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1804 (JFD)

CORA MCRAE, JANE DOE, MARY DOE, SUSAN ROE, ANN MOE, individually and on behalf of all others similarly situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., JANE HODGSON, M.D., DAVID B. BINGHAM, M.D., HUGH SAVAGE, M.D., individually and on behalf of all others similarly situated; WOMEN'S DIVISION OF THE BOARD OF GLOBAL MINISTRIES of the UNITED METHODIST CHURCH, THERESSA HOOVER, its ASSOCIATE GENERAL SECRETARY, ELLEN KIRBY, its EXECUTIVE DIRECTOR, PLAINTIFFS

-against-

JOSEPH A. CALIFANO, JR., Secretary, United States Department of Health, Education and Welfare, DEFENDANT

PLAINTIFFS' AND PROPOSED INTERVENORS' AMENDED COMPLAINT

CLASS ACTION

I

PRELIMINARY STATEMENT

1. This is a civil action for injunctive, declaratory and other relief. Plaintiffs seek a declaration that the enactment and implementation of an amendment ("the 1977 Hyde Amendment") to P.L. 94-439 (popularly known as the HEW Appropriations Act for Fiscal 1976-77) enacted into law on September 30, 1976 is invalid under Title 19

of the Social Security Act and the United States Constitution. In addition, plaintiffs seek (a) a declaration that the enactment and implementation of a superseding rider to P.L. 95-205 (popularly known as a continuing resolution authorizing HEW Appropriations for Fiscal 1977-78 and hereinafter referred to as the "1978 Hyde Amendment") enacted into law on December 10, 1977 is invalid under Title 19 of the Social Security Act and the United States Constitution and (b) an injunction against its implementation. Plaintiffs further seek damages for funds wrongfully withheld under the 1977 and 1978 Hyde Amendments (hereinafter the "Hyde Amendments").

II.

JURISDICTION

2. This Court has jurisdiction of the subject matter and parties to this cause by virtue of 28 U.S.C. Sections 1331, 1361, 2201 and 2202. The amount in controversy, exclusive of interest and costs, exceeds $10,000.

3. This case arises under the Social Security Act, the 1977 and the 1978 Hyde Amendments, and the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

III.

PARTIES

4. Plaintiff CORA McRAE at the institution of this action was a twenty-four-old female citizen of the State of New York and the United States. Plaintiff McRAE was in the first trimester of pregnancy and had made a decision in consultation with her physician to terminate her pregnancy. Plaintiff had no funds of her own with which to pay for an abortion and was financially dependent upon medical assistance (Medicaid) from the State of New York for all medical care. On the basis of the enactment of the 1977 Hyde Amendment plaintiff was

refused an abortion because of fear that Medicaid reimbursement would be withheld.

5. At the time of filing her intervenor's complaint, plaintiff MARY DOE was a nineteen-year-old female citizen of the State of Connecticut and the United States. She was unmarried and had four children, aged five years, four years, three years and eleven months old. Plaintiff MARY DOE was in her second trimester of pregnancy. She was suffering from an overt depression and had stated that she might attempt suicide if she could not obtain an abortion. Her physician, named plaintiff David B. Bingham, M.D., had determined that an abortion was medically necessary for her, but could not certify her pregnancy as life-endangering. Plaintiff had no funds of her own with which to pay for an abortion and was financially dependent upon medical assistance (Medicaid) from the State of Connecticut for all medical care.

6. At the time of the filing of her intervenor's complaint plaintiff JANE DOE was a twenty-five-year-old female citizen of the State of Minnesota and the United States. Plaintiff JANE DOE was in her first trimester of pregnancy. She suffers from a serious case of phlebitis, a condition which would be greatly aggravated by carrying her pregnancy to term. Her physician, named plaintiff Jane Hodgson, M.D., had determined that an abortion was medically necessary for her because of the increased risk of blood clots which may cause permanent health problems and even death, but did not believe she could certify her for an abortion under the 1977 Hyde Amendment. Plaintiff had no funds of her own with which to pay for an abortion and was financially dependen upon medical assistance (Medicaid) from the State of Minnesota for all medical care.

7. Plaintiff SUSAN ROE is a nineteen-year-old native American Indian women who is a citizen of the State of Minnesota and the United States. Plaintiff SUSAN ROE is in her second trimester of pregnancy. She is unmarried and became pregnant four weeks after the birth of her one child. She is suffering from severe emotional trauma and is threatened with severe and long-lasting mental health damage should the pregnancy continue to term.

In addition, the rapid succession of pregnancies threatens substantial harm to her physical health and to the physical and mental capacity of any afterborn child. Her physician, named plaintiff Jane Hodgson, M.D., has determined that an abortion is medically necessary for her but cannot certify it as meeting the standard of either the 1977 or 1978 Hyde Amendment. Plaintiff has no funds of her own with which to pay for an abortion and is financially dependent upon medical assistance (Medicaid) from the State of Minnesota for all medical care.

8. Plaintiff ANN MOE is a fifteen-year-old citizen of the State of Minnesota and the United States. Plaintiff ANN MOE is eleven weeks pregnant. She is unmarried and has a long history of hospitalizations for severe mental illness. She is threatened with severe and longlasting mental health damage should she be forced to continue her pregnancy to term. In addition, she is threatened with all the physical health risks attendant to a teenage pregnancy. Her physician, named plaintiff Jane Hodgson, M.D., has determined that an abortion is medically necessary for her but cannot certify her under either the 1977 or 1978 Hyde Amendment standards. In particular, with respect to severe and longlasting health damage, Dr. Hodgson is unable to obtain the concurrence of plaintiff MOE's family physician, and expects from past experience that any certification would be rejected. Plaintiff ANN MOE has no funds of her own with which to pay for an abortion and is financially dependent upon medical assistance (Medicaid) from the State of Minnesota for all medical care.

9. Plaintiff PLANNED PARENTHOOD OF NEW YORK CITY, INC. ("PPNYC"), is a § 501(c)(3) tax exempt, not-for-profit corporation incorporated in the State of New York which provides family planning services and first trimester abortion services at its state licensed clinics including one located in the eastern district of New York.

PPNYC provides an average of approximately 300 abortions per month for Medicaid eligible patients. The Hyde Amendments prohibit reimbursement from federal

funds for the performance of most abortions sought by PPNYC patients who are covered by Medicaid including Plaintiff McRae. Although the State of New York has continued to reimburse PPNYC from state and local funds for all medically necessary abortions it provides for its patients, the Hyde Amendments have placed such reimbursement in jeopardy.

10. Plaintiff Irwin B. Teran, M.D., is a physician licensed to practice medicine in the State of New York who specializes in obstetrics and gynecology. His offices are at 757 Bushwick Avenue, Brooklyn, New York. Many of his patients are enrolled in the Medicaid program and he is reimbursed for the full range of obstetrical and gynecological medical services he renders for them. Federal matching funds are provided for all such services except for those abortions which fail to qualify under the Hyde Amendments.

11. Plaintiff Jane Hodgson, M.D., is a physician licensed to practice medicine in the State of Minnesota who specializes in obstetrics and gynecology. Her offices are at St. Paul-Ramsey Hospital, 640 Jackson Street, St. Paul, Minnesota. Many of her patients are enrolled in the Medicaid program and she is reimbursed for the obstetrical and gynecological medical services she renders for them. Subsequent to the implementation of the 1977 Hyde Amendment, Minnesota has refused reimbursement for all abortions except those where the pregnancy is certified as life-endangering.

12. Plaintiff David B. Bingham, M.D., is a physician licensed to practice medicine in the State of Connecticut who specializes in obstetrics and gynecology. His offices are at 159 Sachem Street, Norwich, Connecticut. Many of his patients are enrolled in the Medicaid program and he is reimbursed for the obstetrical and gynecological medical services he renders for them. Subsequent to the implementation of the 1977 Hyde Amendment, Connecticut has refused Medicaid reimbursement for all abortions except those where the pregnancy is certified and approved in advance as life-endangering.

13. Plaintiff Hugh Savage, M.D., is a physician licensed to practice medicine in the State of Texas. His offices are at 1201 West Presidio, Fort Worth, Texas. Many of his patients are low-income women who would, except for the Hyde Amendments, be eligible for federally funded abortions paid for either under Medicaid or Title XX of the Social Security Act. Subsequent to the implementation of the 1977 Hyde Amendment, Texas refuses to reimburse for any abortion except those where the pregnancy is certified and approved in advance as life-endangering.

14. Plaintiff Edgar N. Jackson, M.D., is a physician licensed to practice medicine in the State of Georgia who specializes in obstetrics and gynecology. His offices are at 384 Peachtree Street, N.E., Atlanta, Georgia. Many of his patients are enrolled in the Medicaid program and he is reimbursed for the obstetrical and gynecological medical services he renders for them. Subsequent to the implementation of the 1977 Hyde Amendment, Georgia has refused Medicaid reimbursement for all abortions except those where the pregnancy is certified as life-endangering.

15. Plaintiff Lewis H. Koplik, M.D., is a physician licensed to practice medicine in the State of New Mexico who specializes in obstetrics and gynecology. His offices are at 107 Girard Boulevard, S.E., Albuquerque, New Mexico. Many of his patients are low-income women who would, except for the Hyde Amendments, be eligible for federally funded abortions paid for under Medicaid or Title XX of the Social Security Act. Subsequent to the implementation of the 1977 Hyde Amendment, New Mexico has refused to reimburse for any abortions except for those where the pregnancy is certified as life-endangering.

16. The Women's Division of the Board of Global Ministries of the United Methodist Church (hereafter Women's Division) is the policy-making body for United Methodist Women comprising 1.2 million women living in every state and the District of Columbia. The Women's Division sues on behalf of itself and the membership of United Methodist Women among whom are poor, pregnant women who are dependent on Medicaid to obtain safe, legal abortions, whose ability to obtain

such is impeded or precluded by the Hyde Amendments and who object to having someone else's religious beliefs about abortion imposed upon them thereby inhibiting their freedom of conscience. The membership of United Methodist Women also includes federal taxpayers who object to the Hyde Amendments as violating the First Amendment's limitations on the taxing and spending powers, Article 1, Section 8 of the Constitution.

17. THERESSA HOOVER, a citizen of the United States resides in New York City and is ASSOCIATE GENERAL SECRETARY OF THE WOMEN'S DIVISION. She adheres to the Methodist teaching that Methodist women have a religious right and duty to decide in accordance with the principle of responsible parenthood, whether or not to terminate a pregnancy. She is a federal taxpayer who objects to the Hyde Amendments' restrictions on federal funding for abortion as embodying and advancing a different religious belief about abortion. She objects to having her tax funds expended on the basis of this different religious view of abortion, and with the intent and effect of manipulating poor women's determination about responsible parenthood. She also objects to the additional social, human and tax costs which the Hyde Amendment requires for the continuation of unwanted pregnancies, and for medical complications resulting from self-induced abortions or from the forced continuation of unwanted life and health-threatening pregnancies.

18. ELLEN KIRBY is a citizen of the United States, resides in Brooklyn, New York and is EXECUTIVE DIRECTOR OF THE WOMEN'S DIVISION. She adheres to the Methodist teaching that Methodist women have a religious right and duty to decide in accordance with the principle of responsible parenthood, whether or not to terminate a pregnancy. She is a federal taxpayer who objects to the Hyde Amendments' restrictions on federal funding for abortion as embodying and advancing a different religious belief about abortion. She objects to having her tax funds expended on the basis of this different religious view of abortion, and with the intent and effect of manipulating poor women's determination about responsible parenthood. She also objects to the additional social,

human and tax costs which the Hyde Amendment requires for the continuation of unwanted pregnancies, and for medical complications resulting from self-induced abortions or from the forced continuation of unwanted life- and health-threatening pregnancies.

19. Defendant JOSEPH A. CALIFANO is Secretary of the Department of Health, Education and Welfare ("HEW"), and as such is responsible for the overall operation and administration of the Department's programs and for the expenditure of sums appropriated by the Congress for those programs, including Medicaid. He is sued in his official capacity.

IV.

CLASS ACTION ALLEGATIONS

20. Plaintiffs MCRAE, DOE, DOE, ROE and MOE sue on their own behalf and on behalf of the entire class of pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans, who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented or impeded in obtaining medical termination of their pregnancies by the Hyde Amendments (hereinafter "class of women"). The class includes women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary.

21. The action may be maintained as a class action on behalf of the class of women under Rule 23(b)(1)(B) and under Rule 23(b)(2): under Rule 23(b)(1)(B) because the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; and under Rule 23(b)(2) because the parties opposing the class have acted or will act on

grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

22. The class of women is so numerous that joinder of all members is impracticable.

23. Plaintiffs McRAE, DOE, DOE, ROE and MOE will fairly and adequately represent the interests of the class of women. Their attorneys have extensive experience in litigation involving human rights in the field of family planning and abortion. Plaintiffs and their attorneys are prepared to carry forward the claims of the representative parties to final judgment and to protect the interests of all members of the class of women.

The questions of law and fact which plaintiffs McRAE, DOE, DOE, ROE and MOE seek to liquidate, in particular the legality and constitutionality of the Hyde Amendments and their implementation are common to the class they seek to represent.

V.

CLASS OF PHYSICIANS

24. DR. TERAN, DR. HODGSON, DR. BINGHAM, DR. SAVAGE, DR. JACKSON and DR. KOPLIK sue on their own behalf and on behalf of the entire class of duly licensed and Medicaid certified providers of abortional services to eligible women. Plaintiff physicians are prevented or impeded from performing and/or certifying abortions for these women, because of the lack of Medicaid reimbursement. On rare occasions some of these doctors perform abortions for eligible women without fee and for which they receive no reimbursement (hereinafter "class of physicians").

25. Plaintiff physicians also sue on behalf of their patients as defined in paragraph twenty (20).

26. The action may be maintained as a class action on behalf of the class of physicians under Rule 23(b)(1)(B) and under Rule 23(b)(2): under Rule 23(b)(1)(B) because the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class

which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; under Rule 23(b)(2) because the parties opposing the class have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

27. The class of physicians is so numerous that joinder of all members is impracticable.

28. DR. TERAN, DR. HODGSON, DR. BINGHAM, DR. SAVAGE, DR. JACKSON and DR. KOPLIK will fairly and adequately represent the interests of the class of physicians as well as the class of their pregnant Medicaid-eligible patients. Their attorneys have extensive experience in litigation involving the rights of physicians to practice their profession in accordance with their best medical judgment, especially in the field of family planning and abortion. The named plaintiff doctors and their counsel are prepared to carry their claims forward to final judgment and to protect the interests of all members of the class of physicians and class of patients.

29. The questions of law and fact which the named doctors seek to litigate, in particular the legality and constitutionality of the Hyde Amendments, and their entitlement to damages for reimbursement wrongfully withheld, are common to the class they seek to represent.

VI.

THE MEDICAID PROGRAM

30. 42 U.S.C. Sections 1396 *et seq.* (Title XIX of the Social Security Act) passed by Congress in 1965, establishes the Medicaid Program. Title XIX of the Social Security Act and the implementing regulations require states to provide reimbursement for all medically necessary physician and hospital services, with exceptions not here applicable, to families and individuals whose income and resources are insufficient to meet the costs of medical care and services. With the exception of abortions ex-

cluded by the Hyde Amendments, federal matching funds from 50 to 83% of the cost of covered services are provided to states.

31. In 1967 an amendment to Title XIX was enacted to require the states to establish a comprehensive health program for children under the age of 21, entitled Early and Periodic Screening Diagnosis and Treatment ("EPSDT"). 42 U.S.C. § 1396d(a)(4)(B).

32. With the exception of Arizona, every state has a medical assistance plan which receives federal funds and which reimburses certified providers for the services they perform.

33. With the exception of the Hyde Amendments, Title XIX of the Social Security Act operates on a principle of neutrality with respect to an eligible individual's religious beliefs concerning health care. 42 U.S.C. 1396f provides:

> "§ 1396. Observance of religious beliefs
>
> Nothing in this subchapter shall be construed to require any State which has a plan approved under this subchapter to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parents or guardian objects) thereto on religious grounds."

In addition, the Medicaid program affirmatively covers costs of health care the form of which is dictated by an individual's religious beliefs; see e.g. 45 C.F.R. 249.10 (b)(17)(ii). (authorizing Christian Science Services).

VII.

THE HYDE AMENDMENTS

34. Prior to the implementation of the 1977 Hyde Amendment, federal matching funds were available for all abortions for eligible individuals which a state chose to include in its Medicaid plan. Some states, including New York, provided reimbursement for all abortions for eligible individuals. Other states, including Connecticut and Pennsylvania, limited Medicaid payments to those abortions for eligible individuals that were certified as medically necessary.

35. The 1977 Hyde Amendment, Section 209 of Public Law 94-439, provides that

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

36. On October 22, 1976, this Court issued, and on October 29, 1976, reaffirmed, a preliminary injunction against implementation of the 1977 Hyde Amendment on constitutional grounds. On July 29, 1977, the Supreme Court ordered the judgment vacated and the case remanded to this Court for reconsideration in light of *Beal* v. *Doe*, 97 S. Ct. 2366, and *Maher* v. *Roe*, 97 S. Ct. 2376 (1977).

37. On July 28, 1977, this Court vacated the injunction and issued a new temporary restraining order against the implementation of the 1977 Hyde Amendment. This temporary restraining order was lifted on August 4, 1977. Defendant Califano immediately implemented the 1977 Hyde Amendment ("Exhibit A").

38. The Department of Health, Education and Welfare failed to issue and make known any standards, regulations or guidelines which clarify what abortions will be federally reimbursed under the 1977 Hyde Amendment standard.

39. State agencies administering the various state medical assistance programs do not know which abortions will be federally reimbursed under the 1977 Hyde Amendment standard.

40. Medicaid providers and eligible pregnant women do not know which abortions will receive federal reimbursement under the 1977 Hyde Amendment standard.

41. The defendant failed to advise the states of their continuing obligations under Title XIX to reimburse for medically necessary abortions or to enforce the same.

42. In response to implementation of the 1977 Hyde Amendment most states adopted policies limiting reimbursement for abortions for the members of the plaintiff class of women to those cases where it was necessary to terminate a pregnancy which would endanger the life of the woman if the fetus were carried to term.

43. Because of the vagueness of the language of the 1977 Hyde Amendment, the failure of defendant Califano to provide clarifying regulations, and prior approval and other procedural requirements adopted in some states, many women in the plaintiff class have been and continue to be unable to obtain an abortion financed by Medicaid even in situations in which the life of the woman is endangered by the continuation of the pregnancy.

44. On December 10, 1977, the President signed a continuing resolution authorizing Labor-HEW expenditures through fiscal year 1978, containing a rider superseding the 1977 Hyde Amendment (the "1978 Hyde Amendment"). The 1978 Hyde Amendment reads as follows:

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been promptly reported to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians. Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of ectopic pregnancy. The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced."

45. On December 10, 1977, defendant Califano announced the implementation of this amendment by mailing the text of it to all state Medicaid agencies along with a brief interpretative statement ("Exhibit B").

46. On information and belief, as of the filing of this amended complaint, no state, except Alabama, has liberalized its policy on the reimbursement of abortions in response to the 1978 Hyde Amendment.

VIII.

IRREPARABLE INJURY

47. As a result of the Hyde Amendments, the plaintiffs and the members of the classes they represent have been and continue to be subjected to immediate and irreparable harm, namely:

(a) Plaintiffs McRae, Doe, Doe, Roe and Moe and others in the class of women have been and will be refused Medicaid abortions and will be unable to obtain the abortions they desire and/or which are medically necessary without the relief sought in this complaint.

(b) Drs. Teran, Hodgson, Bingham, Savage, Jackson and Koplik and members of the class of physicians are, with rare exceptions, not able to perform such abortions without reimbursement and have refused or will refuse and continue to refuse, this treatment.

(c) Plaintiff PPNYC's ability to serve Medicaid-eligible women who seek abortions and who are unable to pay for them is placed in jeopardy by the

Hyde Amendments. Plaintiff PPNYC will be financially unable to serve such women if Medicaid reimbursement should be cut off.

(d) Plaintiff women and members of their class who are discouraged, impeded and/or prevented from obtaining abortions are subjected to the imposition of one religious-belief about abortion. Some members of the class of plaintiff women and of United Methodist Women are restrained in the free exercise of their religious beliefs that an abortion is necessary or appropriate under the circumstances.

(e) The taxpayer plaintiffs are required to pay for the added cost of services related to carrying unwanted normal pregnancies to term; of treatment of complications arising from self-induced and illegal abortions as well as unwanted health- and life-threatening pregnancies and their effects, and of additional physician consultations and administrative expenses.

IX.

SOCIAL SECURITY ACT CLAIMS

FIRST CAUSE OF ACTION

48. By allowing states to exclude state financed Medicaid reimbursement for medically necessary abortions, including those reimbursable under the Hyde Amendments, defendant Califano violates Title XIX of the Social Security Act which mandates that a state Medicaid plan provide reimbursement for medically necessary hospital and physician services provided to eligible individuals.

SECOND CAUSE OF ACTION

49. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 48.

50. The Hyde Amendments' failure to provide for reimbursement for all medically necessary abortions, and defendant Califano's failure to mandate state coverage for those members of the plaintiff class of women who

are under twenty-one years of age, violates Title XIX of the Social Security Act, 42 U.S.C. § 1396(a)(4)(B), and the regulations promulgated thereunder.

THIRD CAUSE OF ACTION

51. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 50.

52. By permitting the states to eliminate Medicaid reimbursement for abortions whether or not federally reimbursable under the Hyde Amendments, Defendant Califano violates the framework of Title XIX of the Social Security Act, and particularly 42 U.S.C. 1396f, and regulations promulgated pursuant thereto, assuring that Medicaid assistance be provided consonant with and not in violation of a person's religious beliefs except in cases of danger to the public health.

X.

CONSTITUTIONAL CLAIMS OF THE WOMEN PLAINTIFFS: EQUAL PROTECTION, DUE PROCESS AND PRIVACY

FOURTH CAUSE OF ACTION

53. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 52.

54. The enactment or implementation of a Medicaid program which provides payment for all medically necessary physician and hospital services but excludes medically necessary abortion services denies plaintiff class of women equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution.

FIFTH CAUSE OF ACTION

55. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 54.

56. Under the Social Security Act, Defendant Califano routinely authorizes reimbursement of a substantial per-

centage of the cost of all pregnancy related care and services for Medicaid-eligible women who choose to carry their pregnancies to term. Such costs are paid by all states which participate in the Medicaid program.

57. The Hyde Amendments' prohibition of federal reimbursement for the cost of a substantial proportion of medically necessary abortion services for eligible women who seek to terminate their pregnancies by abortion creates an invidious classification which denies plaintiff class of women due process and equal protection of the laws guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

SIXTH CAUSE OF ACTION

58. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 57.

59. The enactment or implementation of a Medicaid program which provides payment for all medically necessary physician and hospital services for eligible men but excludes medically necessary abortion services for eligible women constitutes an unlawful discrimination on the basis of sex in violation of the due process and equal protection of the laws guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

SEVENTH CAUSE OF ACTION

60. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 59 and further allege as follows:

61. Under the Social Security Act, the federal government provides 90% matching funds which together with state funds pay the full cost of sterilization.

62. By denying payment for medically necessary abortion services to Medicaid-eligible women, the Hyde Amendments operate to coerce women to resort to irreversible sterilization in order to terminate an existing pregnancy and/or to avoid the risk of a future pregnancy which cannot be aborted, all in violation of the due process and equal protection of the laws guaranteed by

the First, Fourth, Fifth and Ninth Amendments to the Constitution.

EIGHTH CAUSE OF ACTION

63. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 62.

64. The Hyde Amendments on their face and as applied are vague and overbroad in violation of plaintiffs' rights under the First, Fourth, Fifth and Ninth Amendments to the Constitution.

NINTH CAUSE OF ACTION

65. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 64.

66. Under the Social Security Act the federal government provides matching funds for all medically necessary procedures covered by state plans and particularly for all pregnancy related services including complications from pregnancy and self-induced or illegal abortions.

67. By denying payment the Hyde Amendments punish pregnant women for whom abortions are medically necessary in violation of the due process and equal protection of the laws guaranteed by the First, Fourth, Ninth and Fifth Amendments to the Constitution.

TENTH CAUSE OF ACTION

68. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 67.

69. The requirement of a two-physician certificate in the 1978 Hyde Amendment impermissibly burdens the fundamental right of plaintiff class of women to obtain an abortion as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

ELEVENTH CAUSE OF ACTION

70. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 69.

71. Pregnant women who can pay the costs of medically necessary abortion services can obtain such services.

72. On their face and as implemented, the Hyde Amendments discourage and prevent doctors from performing abortions necessary to terminate health- and life-threatening pregnancies and encourage them to provide unnecessary and dangerous treatment, such as a D & C (dilation and curettage) or DES (di-ethylstilbestrol) to prevent implantation, thereby causing doctors to engage in conduct which could be deemed malpractice with respect to paying patients.

73. Black and third world women are disproportionately represented among Medicaid-eligible women, and the Hyde Amendments have a disparate impact on their ability to obtain medically necessary abortions.

74. On their face and as applied, the Hyde Amendments' restrictions on funding of medically necessary abortion services to eligible women constitute an invidious and discriminatory classification based on poverty, race and minority status, which deprives and punishes the plaintiff class of women in violation of due process and equal protection of the law guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

TWELFTH CAUSE OF ACTION

75. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 74.

76. The reporting requirements of the 1978 Hyde Amendment violate the privacy, due process, and equal protection rights of those members of plaintiff class who are victims of rape or incest in violation of the First, Fourth, Fifth and Ninth Amendments to the Constitution.

XI.

CONSTITUTIONAL CLAIMS OF PHYSICIAN PLAINTIFFS AND PPNYC: EQUAL PROTECTION, DUE PROCESS AND PRIVACY

THIRTEENTH CAUSE OF ACTION

77. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 76.

78. Many pregnant women, including the named plaintiffs, and their class have consulted and will continue to consult Drs. Teran, Hodgson, Bingham, Savage, Jackson, Koplik and the class of physicians and PPNYC. For many such women such physicians would, in the exercise of their best professional judgment, agree that abortions are medically necessary and would perform the abortions sought by such women.

79. Defendant's prohibition of reimbursement to the members of the physician class for such abortions performed upon Medicaid patients who request them deprive plaintiff class of physicians of the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution.

80. The Hyde Amendments infringe upon the right of plaintiffs class of physicians and PPNYC to give and their patients' right to receive necessary medical treatment and advice, in accordance with accepted medical standards, pertaining to the decision whether to terminate a pregnancy, in violation of the First, Fourth, Fifth and Ninth Amendments to the Constitution.

81. Implementation of the Hyde Amendments by the defendant deprives plaintiff class of physicians and PPNYC of substantial income from abortion services normally rendered to Medicaid-eligible women, in violation of the right of members of plaintiff class of physicians and PPNYC to render medical services and to receive fees for such services, all without due process of law, in violation of the Fifth Amendment to the Constitution.

FOURTEENTH CAUSE OF ACTION

82. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 81.

83. The class of physicians is subject to federal and state civil and criminal sanctions for certifications deemed to be improper or fraudulent under the Hyde Amendment standards. There are no sanctions on the class of physicians should they fail to certify a qualifying abortion.

84. The Hyde Amendments are vague and overbroad in violation of plaintiffs' rights under the First, Fourth, Fifth and Ninth Amendments to the Constitution.

FIFTEENTH CAUSE OF ACTION

85. Plaintiffs repeat and reallege all of the allegations of paragraphs 1 through 84.

86. The 1978 Hyde Amendment requires a two-physician certificate in cases where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

87. This requirement impermissibly infringes on a doctor's right to practice medicine in accordance with his/her best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution and is in violation of Title XIX of the Social Security Act.

XII.

ESTABLISHMENT AND FREE EXERCISE CLAIM

SIXTEENTH CAUSE OF ACTION

88. Plaintiffs repeat and reallege all of the alegations of paragraphs 1 through 87.

89. The Hyde Amendments constitute an exercise of the taxing and spending powers of the Congress under Article 1, Section 8 of the Constitution.

90. The purpose and effect of the Hyde Amendments is to impede and/or prevent indigent pregnant women from obtaining abortions.

91. The Hyde Amendments constitute enactment into law of one religious belief respecting abortions and the nature of the fetus and the imposition of that religious view on Medicaid-eligible women who would otherwise choose abortion in accordance with their religious or non-religious beliefs.

92. There is no secular justification for the Hyde Amendments.

93. The enactment of this religious view of abortion into law as exemplified by the Hyde Amendments has created and threatens further excessive entanglement and political divisiveness.

94. The Hyde Amendments discourage, impede and/or prevent plaintiff women and their class from obtaining safe, legal abortions in accordance with the different teachings of the religions to which they adhere and/or with the dictates of their conscience.

95. The Hyde Amendments, on their face and as applied violate the prohibitions of the First Amendment against laws respecting the establishment or religion and interfering with the free exercise thereof.

XIII.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that:

(1) This Court declare that the Hyde Amendments facially and as applied are unconstitutional, null and void.

(2) This Court enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the defendant, his successors in office, agents and employees, and all other persons in concert with him from giving any effect to the 1978 Hyde Amendment.

(3) This Court, in the alternative, declare that despite the Hyde Amendments, Title XIX of the Social Security Act mandates that states continue to reimburse for medically necessary services, and

(4) This Court enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure requiring the defendant, his successors in office, agents and employees and all other persons in concert with him to disapprove state Medicaid plans which limit reimbursement for medically necessary abortions.

(5) This Court award damages for reimbursement unlawfully withheld under the Hyde Amendments.

(6) This Court award plaintiffs their costs herein, attorneys fees, and grant them such other and further relief as this Court may deem just, proper and equitable.

Dated: January 5, 1977

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, NY 10022
212/758-4010

By: /s/ Eve W. Paul
HARRIET PILPEL
EVE W. PAUL
FREDERIC S. NATHAN
LAURENCE VOGEL

Attorneys for Plaintiff PLANNED PARENTHOOD OF NEW YORK CITY, INC.

SYLVIA A. LAW
40 Washington Square South
New York, NY 10012
212/598-7642

/s/ Rhonda Copelon
RHONDA COPELON
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, NY 10003
212/674-3303

JANET BENSHOOF
JILL LAURIE GOODMAN
ELLEN LEITZER
NADINE TAUB
American Civil Liberties Union
22 East 40th Street
New York, NY 10016
212/725-1222

By: /s/ Janet Benshoof
JANET BENSHOOF

Attorneys for Women and Doctor Plaintiffs and for the Women's Division of the Board of Global Ministries of The United Methodist Church and its Members.

EXHIBIT "A"

[SEAL]

HEW NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOR IMMEDIATE RELEASE

Thursday, August 4, 1977

Marcus . . (202) 245-6733
Winston . (202) 245-6343

Statement

by

Joseph A. Califano, Jr.

Secretary of Health, Education, and Welfare

Section 209 of Public Law 94-439, the Labor-HEW Appropriation Act of 1977—popularly known as the Hyde Amendment—provides that:

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

Last October, a Federal District Court issued an order enjoining the Department from enforcing the Hyde Amendment. That injunction has now been dissolved. Accordingly, the Department will provide Federal financial participation in the cost of abortions only where the attending physician, on the basis of his or her professional judgment, has certified that the abortion is necessary because the life of the mother would be endangered if the fetus were carried to term.

The legislative history of the Hyde Amendment, however, makes clear that the Amendment does not bar funding for certain medical procedures. Specifically, the Conference Committee Report interpreting the Hyde Amendment states as follows:

> "Nor is it the intent of the Conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or for the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum." (HR Rep. No. 95-1555, at p. 3)

Thus Federal funds will continue to be available for such medical procedures. "Treatment for rape or incest victims" is, however, limited for these purposes to prompt treatment before the fact of pregnancy is established. As in all cases, Federal funds for abortions for rape or incest victims will be available where the physician has certified that the life of the mother would be endangered if the fetus were carried to term.

(The Department is transmitting this statement to all State Medicaid agencies, HEW regional offices, Public Health Service Hospitals and grantees, and State medical associations. The statement will be published in the *Federal Register*.)

EXHIBIT "B"

[SEAL]

HEW NEWS

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

FOR IMMEDIATE RELEASE
Saturday, December 10, 1977

Winston: (202) 245-6343

Statement by

Joseph A. Califano, Jr.

Secretary of Health, Education, and Welfare

The President signed a continuing resolution today authorizing Labor-HEW expenditures through the fiscal year 1978. This resolution contains language, which supersedes Section 209 of Public Law 94-439, the Labor-HEW Appropriations Act of 1977. Section 209 has popularly been referred to as the Hyde Amendment.

The new language is as follows:

"*Provided*, That none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

"Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

"The Secretary shall promptly issue regulations and establish procedures to ensure that the provisions of this section are rigorously enforced."

Accordingly, from this point forward, the Department will provide Federal financial participation in the cost of abortions, including those following rape or incest, where a physician, on the basis of his or her professional judgment, has certified in writing that the abortion is necessary, because the life of the mother would be endangered if the fetus were carried to term or where two physicians, on the basis of their professional judgment, have certified in writing that severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

In addition, when a case of rape or incest has been reported promptly to a law enforcement agency or public health service, the Department will provide Federal financial participation in the cost of medical procedures where a physician, on the basis of his or her professional judgment, has certified in writing that such procedures are necessary for the victim of such rape or incest.

Federal funding will also be provided for drugs or devices to prevent implementation of the fertilized ovum and for medical procedures where a physician, on the basis of his or her professional judgment, has certified in writing that such procedures are necessary for the termination of an ectopic pregnancy.

I have asked the General Counsel to prepare regulations and establish procedures as soon as possible to ensure that the foregoing limitations established by Congress are rigorously enforced.

As I promised the Senate during my confirmation hearings, I will carry out the laws passed by the Congress to the best of my ability in this sensitive area, as in all others.

(The Department is transmitting this statement to all State Medicaid agencies, HEW regional offices, Public Health Service Hospitals and grantees, and State medical associations. The statement will be published in the *Federal Register*.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 C 1804

CORA MCRAE, ET AL., PLAINTIFFS

—against—

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

—and—

SENATORS JAMES L. BUCKLEY, ET AL., INTERVENOR-DEFENDANTS

JUDGMENT

This action came on for trial before the Court, the Honorable John F. Dooling, Jr., District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered it is

ORDERED, ADJUDGED and DECLARED that

1. The plaintiffs and plaintiffs intervenors are entitled to maintain this action as a class action pursuant to F.R.C.P. Rule 23(a), (b)(1) and (2) on behalf of medicaid-eligible pregnant women desiring and denied medicaid abortions because of the federal legislation restricting abortion funding, including medicaid-eligible pregnant women whose attending physicians have advised them that abortion is medically necessary in their cases and who have been denied medicaid abortions because of the federal legislation restricting abortion funding, and on behalf of providers of abortions, including providers of medically necessary abortions.

2. Section 209 of Public Law 94-439 of September 30, 1976, 90 Stat. 1434, Section 101 of Public Law 95-205 of December 9, 1977, 91 Stat. 1460, Section 210 of Public Law 95-480 of October 18, 1978, 92 Stat. 1586, and Section 109 of Public Law 96-103 of November 20, 1979,

are unconstitutional as applied to abortions that are necessary in the professional judgment of the pregnant woman's atending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman.

3. Defendant, her successors in office, agents, servants, employees, attorneys and those other persons in active concert and participation with her who receive actual notice of this order by personal service or otherwise.

A. Cease to give effect to Section 209 of Public Law 94-439, Section 101 of Public Law 95-205, Section 210 of Public Law 95-480, and Section 109 of Public Law 96-103 so far as they forbid the making of medicaid payments for abortions performed by qualified medicaid providers in cases in which the abortions are necessary in the professional judgment of the pregnant woman's attending physician;

B. Continue to authorize the expenditure of federal matching funds for medically necessary abortions provided by duly certified providers for medicaid-eligible women at the proportionate level and in accordance with the standard of medical necessity set forth in subparagraph 2 above; and

C. Forthwith communicate the substance of this Judgment to the Regional Directors of the Department of Health, Education and Welfare, with instructions that they promptly disseminate that communication to all State medicaid authorities within their regions, with instructions that they in turn communicate it to all local medicaid authorities and providers of pregnancy-related care to medicaid-eligible women.

Brooklyn, New York
January 15, 1980

Approved
January 15, 1980

Clerk

/s/ John F. Dooling
JOHN F. DOOLING
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 C 1805

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
PLAINTIFF

—against—

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

JUDGMENT

This action came on for trial before the Court, the Honorable John F. Dooling, Jr., District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, it is

ORDERED, ADJUDGED and DECLARED that

1. Plaintiff is a qualified provider of medicaid services and provides medically necessary abortional services to medicaid-eligible women;

2. Section 209 of Public Law 94-439 of September 30, 1976, 90 Stat. 1434, Section 101 of Public Law 95-205 of December 9, 1977, 91 Stat. 1460, Section 210 of Public Law 95-480 of October 18, 1978, 92 Stat. 1586, and Section 109 of Public Law 96-103 of November 20, 1979, are unconstitutional as applied to abortions that are necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial and the woman's age, relevant to the health-related well-being of the pregnant woman;

3. Defendant, her successors in office, agents, servants, employees, attorneys and those other persons in active

concert and participation with her who receive actual notice of this order by personal service or otherwise.

A. Cease to give effect to Section 209 of Public Law 94-439, Section 101 of Public Law 95-205, Section 210 of Public Law 95-480, and Section 109 of Public Law 96-103 so far as they forbid the making of medicaid payments for abortions performed by qualified medicaid providers in cases in which the abortions are necessary in the professional judgment of the pregnant woman's attending physician;

B. Continue to authorize the expenditure of federal matching funds for medically necessary abortions provided by duly certified providers for medicaid-eligible women at the proportionate level and in accordance with the standard of medical necessity set forth in subparagraph 2 above; and

C. Forthwith communicate the substance of this Judgment to the Regional Directors of the Department of Health, Education and Welfare, with instructions that they promptly disseminate that communication to all State medicaid authorities within their regions, with instructions that they in turn communicate it to all local medicaid authorities and providers of pregnancy-related care to medicaid-eligible women.

Brooklyn, New York
January 15, 1980

/s/ Richard H. [Illegible]
RICHARD H. [ILLEGIBLE]

Approved

January 15, 1980

/s/ John F. Dooling
JOHN F. DOOLING
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1804

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, JR., ET AL., DEFENDANTS

STIPULATION

It is hereby stipulated and agreed by the undersigned parties that the amended complaint in this action filed January 9, 1978, should be amended as follows:

> All allegations and claims should include and incorporate a challenge to the Rider to the 1978-79 HEW-Labor Appropriations Bill passed on October 14, 1978 entitled Public Law 95-480. No responsive pleadings are necessary and all evidence and briefs submitted are hereby deemed to incorporate the new rider.

/s/ Janet Benshoof
JANET BENSHOOF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016
For All Plaintiffs

/s/ Richard P. Caro
RICHARD CARO
Assistant United Statets
Attorney for the Eastern
District of New York
225 Cadman Plaza
Brooklyn, New York 11201
For Defendant Califano

/s/ Gerald Bodell
GERALD BODELL
102 East 35th Street
New York, New York 10016
For Defendant-Intervenors
Buckley, et al.

/s/ A. Lawrence Washburn
A. LAWRENCE WASHBURN
117 Pennsylvania Avenue
Brooklyn, New York 11207
For Defendant-Intervenor
Pernicone

So Ordered:

/s/ John F. Dooling
JOHN F. DOOLING
U.S.D.J.

Dated: November 28, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, JR., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

—and—

SENATOR JAMES L. BUCKLEY, ET AL., INTERVENOR-DEFENDANTS

MEMORANDUM and ORDER

* * * *

2. The defendant Secretary has questioned whether the case is to be considered a class action, in light of the vacatur of the 1976 injunction by the Supreme Court, and plaintiffs show from the record that the successive amendments of the complaint have been made on the basis that the case has been a class suit from the beginning and has been continued as such. The original Memorandum and Order on the injunction motion determined the class and standing issues and it had been assumed that there was no issue on these points. However, it may be best to go over the ground again.

The evidence has left no doubt that the class of Medicaid-eligible women who, with their physicians, have decided to terminate their pregnancies before viability is too numerous for all to be joined in this action, and that the class of providers of the medical service required for the performance of such legal abortion services who are

qualified and willing to render such service is too numerous for all to be joined in the action. The issues of law and the issues of fact relevant to the determination of the issues of law presented by the case are common to all members of each class, and the claims of the plaintiff members of each of the classes are typical of the claims of all other members of the class. The plaintiffs, as they have been represented in this case, have fairly and adequately protected the interests of the classes and will continue to do so. The action is one within Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure. The action has to this date in fact been maintained as a class action and it should continue to be so maintained. The two classes are defined substantially as described in the amended complaint filed January 9, 1978:

1. The class of pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans, who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented or impeded in obtaining medical termination of their pregnancies by Public Law 94-439, Section 209, Public Law 95-205, Section 101, and Public Law 95-480, Section 210. The class includes women of all religious and non-religious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary; and

2. The class of duly licensed and Medicaid certified providers of abortional services to eligible women who are prevented or impeded from performing and/or certifying abortions for the class of women represented by the plaintiff women because of the lack of Medicaid reimbursement.

3. Counsel will have observed that the page numbering of the transcripts for September 6 and December 4, 1978, duplicates that of earlier transcripts. In order to make certain that there will be no confusion in citation,

I have asked the Court Reporter to renumber the pages of the September 6, 1978 transcript through the conclusion of Congressman Hyde's testimony.

It is so ORDERED.

Brooklyn, New York

January 29, 1979.

/s/ John F. Dooling
JOHN F. DOOLING
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1804 (JFD)

CORA MCRAE, ET AL., PLAINTIFFS

—against—

PATRICIA HARRIS, ET AL., DEFENDANTS

ORDER AMENDING COMPLAINT

Upon the agreement of the parties, it is hereby ordered that the Amended Complaint in this action filed January 9, 1978, shall be amended as follows:

> All allegations and claims shall include and incorporate a challenge to the rider to the Fiscal Year 1980 Labor-HEW Appropriations enacted by joint resolution (H.J. Res. 440), and entitled Pub. L. No. 96-123, § 109.

It is further ordered that no responsive pleadings are necessary and all evidence and briefs submitted are hereby deemed to incorporate the new rider.

/s/ John F. Dooling, Jr.
JOHN F. DOOLING, JR.
U.S.D.J.

Dated: Brooklyn, New York
January 15, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 C 1804

CORA MCRAE, ET AL., PLAINTIFFS

—against—

SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

—and—

SENATORS JAMES L. BUCKLEY, ET AL.,
INTERVENOR-DEFENDANTS

ORDER

The parties stipulated the authenticity of Exhibits Nos. 300-454 and 456-471 for identification, and defendant and defendant-intervenors objected to their receipt in evidence on grounds of relevancy and competency; final ruling on their admissibility was reserved until the determination of the case on the merits because a part of the defense contentions was that the dispositive legal issues in the case required decision of the case without reference to the existence or content of the types of material embraced in the exhibits, and plaintiffs contended that the First Amendment issues could not be resolved without considering the nature and content of the exhibits and their place in the movement for the adoption of a "pro-life amendment" and the successive "Hyde Amendments." As indicated by the decision, the objection to the receipt of the exhibits in evidence has been overruled and they have been considered and relied upon to the extent indicated in the decision; to the extent that, the ex-

hibits are or contain hearsay they have not been received and considered for the truth of the matter asserted but have been received and considered on the basis that their publication and dissemination formed a part of the abortion debate and were an element of the ambience of the debate.

It is so ORDERED.

Brooklyn, New York
February 14, 1980

/s/ John F. Dooling, Jr.
JOHN F. DOOLING, JR.
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ.

CORA MCRAE, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., DEFENDANT

AFFIDAVIT

STATE OF MICHIGAN)
ss.:
COUNTY OF WASHTENAW)

JOHAN W. ELIOT, M.D., having duly affirmed, deposes and says:

1. I am a physician with special skills in health care of women, including the performance of abortions, and have Board certification in Pediatrics and in Preventive Medicine, with specialization in maternal and child health and adolescent medicine. My offices are at the Department of Community Health Services, School of Public Health, University of Michigan, and at 912 North Main Street, Ann Arbor, Michigan. I reside at 1027 Miller Avenue, Ann Arbor, Michigan.

2. I am a member of the class of Medicaid-certified providers of abortional services to Medicaid-eligible women.

3. I am making this Affidavit in support of a temporary restraining order and preliminary injunction to prevent the imminent cut-off of federal reimbursement for abortions if the Hyde amendment is implemented.

4. I am making this Affidavit to call to this Court's attention the impact the implementation of the Hyde Amendment will have in the State of Michigan.

5. Currently in the State of Michigan there is federal reimbursement for abortions for Medicaid-eligible women under Title XIX of the Social Security Act.

6. In 1975 the Michigan State Legislature enacted legislation restricting payment for abortion from Medicaid funds to cases of therapeutic abortion for "medical necessity." The Department of Social Services issued a bulletin on this subject (10/22/75) stating that "documentation of medical necessity" must be provided for therapeutic abortions. The Executive Director of the Washtenaw County League for Planned Parenthood, Carol Peacock, called the Department of Social Services in Lansing to ask what constituted "medical necessity." She was told that this referred to medical conditions only, and did not include emotional or mental health considerations, and that therapeutic abortion applied to "life-death situations" only, where "the mother is in danger of losing her life." Shortly thereafter, the Attorney General of Michigan, Frank Kelley, issued a ruling that the new law was not in conformity with the United States Supreme Court decision in Roe versus Wade, and that the law was therefore judged to be unconstitutional and therefore inoperative. The Hyde amendment passed by Congress under review by this Court bears a considerable resemblance to the Michigan legislation of 1975. I would therefore expect, if it were put in effect, that the Michigan Department of Social Services would issue equally restrictive interpretive regulations. The result would very probably be that nearly all Michigan Medicaid patients needing and desiring an abortion would be denied payment for it under Medicaid.

7. I seek to represent both the claims of the class of doctors, and the claims of the class of pregnant Medicaid-eligible women.

8. I am the Medical Director for the Washtenaw County League for Planned Parenthood Clinic located at 912 North Main Street, Ann Arbor, Michigan. This

clinic is incorporated as a nonprofit medical clinic which provides abortion, contraceptive and minor gynecological care to women, and vasectomy for men. Last year I performed 872 abortions. The clinic performed 2533 abortions. Approximately six percent of these were reimbursed under Title XIX. About six percent of the income of the clinic ($26,600) is from federally reimbursed abortions.

9. If the Hyde Amendment is not restrained, I and other physicians at the Washtenaw County League for Planned Parenthood will have to refuse to do virtually any abortions for Medicaid-eligible women becase the Washtenaw County League for Planned Parenthood will receive no reimbursement, and this agency can afford to do very few free abortions. We shall be denying many poor women abortions I consider medically necessary. However, we would have to increase our fees for all women seeking abortions.

10. I and two other physicians on the staff of the Washtenaw County League for Planned Parenthood treat many pregnant Medicaid-eligible women who seek abortions which are medically necessary for many reasons. For example, I present summaries of five cases:

Case 1.

A 19-year-old woman was threatened with a knife and was raped by an unidentified tall man on a less-traveled residential street, at night. Because there had been a series of rapes in the area within the past month, she was terrified that she might be targeted for further attack if she attempted to report it. Two months later, pregnancy symptoms forced her to seek help. Because she was currently jobless and without income, she was helped to apply for Medicaid. Her abortion was uncomplicated, but she was given supplementary counselling, both before and after the procedure to assist her in emotional adjustment to this traumatic experience.

Case 2.

A 33-year-old mother of three children was furloughed from the state mental hospital, for weekends at home with her family, after nine months of treatment for a cyclic depressive state for which she had been under treatment for several years. Although she had been prepared for her home furlough by fitting with a diaphragm, and used it conscientiously, she became pregnant, apparently on her second visit home. The family had low income, as the husband was only intermittently employed, and the family already received welfare assistance. The patient was much disturbed at discovery of the pregnancy and her doctors judged it definitely inadvisable for her mental health to try to carry the pregnancy to term. With Medicaid support she was promptly given an abortion, with careful counselling. She recovered quickly and well, and seemed to be continuing her progressive mental health improvement when last seen two months later.

Case 3.

A 30-year-old woman was greatly burdened by care of two retarded children. She urgently requested an abortion because she found herself unexpectedly pregnant despite use of an intrauterine device. She feared that this pregnancy might produce another retarded child, and that even if the child were normal, the burdens of care for the two older retarded children would deprive her of time and energy to give the new child the physical care and loving attention needed for normal growth. Her pregnancy was terminated uneventfully, with Medicaid financial assistance, and she was provided with information and referred for a tubal ligation, at her request.

Case 4.

A young woman, 16 years old, came to the clinic in great distress, with knowledge, permission and support of her mother, but without knowledge of her

father or foster brother. She requested an early abortion with deep and bitter regret, as the pregnancy was the result of a momentary lapse of self-control in relation to her foster brother, who was not a blood relation, and with whom she had fallen deeply in love. She recognized that there was no possibility at all of carrying through with a marriage in this situation, and that if the pregnancy were known to her father and foster brother, very severe emotional eactions would ensue which were likely to split the family asunder, with great mental anguish for all. The family was not well off, and was registered already for Medicaid assistance, so that it was possible to terminate this pregnancy in a confidential manner with Medicaid financing. The mental health of this young woman, both present and future, and the integrity of this family, were preserved.

Case 5.

A 14-year-old deaf young woman with juvenile diabetes was brought by her mother for termination of a pregnancy that resulted from a transient affair with a young man who took advantage of this socially handicapped young woman. While the diabetes was under adequate control and a pregnancy could quite possibly have been successfully managed with good and intensive obstetric care, there was clearly increased risk to this young woman and to her infant if the pregnancy were allowed to continue. There would, in addition, have been interruption of her schooling, and impairment of her emotional adjustment, as she was greatly distressed by the reality of her situation and very much wanted the abortion. It was carried out with Medicaid assistance, since her mother was divorced and already receiving welfare assistance.

Minor details of these cases have been altered or omitted so as to make specific identification of persons very unlikely.

These are several examples of abortions which I consider medically necessary, but which I have to refuse to do if the Hyde Amendment is implemented, because the woman's life was not in danger in any of these cases.

11. The Washtenaw County League for Planned Parenthood, of which I am the Medical Director, is the only provider for Medicaid abortions in Washtenaw County, with the exception of a small number of very sick women, whose pregnancies cannot safely be terminated in a clinic. If the Hyde Amendment is implemented, approximately 150 Medicaid-eligible women in the area who need abortions will be denied services per year. The only other provider, the University Hospital, will have great financial difficulty in providing abortions for the very sick women now cared for there, if the Hyde Amendment is implemented. I don't know of any charitable institutions or other organizations which will be able to provide free abortions for all those women who need them, much as they might wish to.

12. I also feel that the unavailability of safe legal abortion will put an unconscionable pressure on poor women to avoid pregnancy at all costs, thereby coercing them into being sterilized, at an earlier age than they might really be ready for this step.

13. I consider the cut-off of federal funds for abortions to be an unconscionable interference with my ability to render necessary medical treatment and the right of my Medicaid-eligible patients to receive it. I consider this impending cut-off of funds to be a violation of my constitutional rights as well as those of my pregnant patients.

14. If a restraining order is not granted by this Court, the Washtenaw County League for Planned Parenthood will suffer irreparable harm, both financially and professionally, in what it will be unable to render some of its patients the medical care they need, and it will lose approximately six percent of its income.

15. Pregnant Medicaid-eligible patients will also suffer irreparable harm if a restraining order is not granted. I believe, in Washtenaw County alone, up to 150 Medi-

caid-eligible women who need abortions will seek cheap, illegal abortions, try to self-abort, or try to carry unwanted and health-threatening pregnancies to term. Deaths and serious health problems are likely to result from these procedures.

16. A temporary restraining order and preliminary injunction was sought previously from this Court, and was granted. This present motion involves new considerations arising from the Supreme Court's order of June 29, 1977. Since the Supreme Court order of June 29, I have not made a similar application to this or any other court.

17. Because of the imminence of the irreparable harm that would be caused by the implementation of the Hyde Amendment, I am advised by my attorneys that it may be necessary to proceed by order to show cause.

WHEREAS, affiant respectfully moves this Court for a temporary and preliminary injunction against the implementation of the Hyde Amendment.

/s/ Johan W. Eliot, M.D.
JOHAN W. ELIOT, M.D.

Affirmed before me this
24th day of July, 1977

DUANE G. WEBER
Notary Public, Washtenaw County, Mich.
My Commission Expires August 18, 1979

/s/ Duane G. Weber
DUANE G. WEBER
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ.

CORA MCRAE, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., DEFENDANT

AFFIDAVIT

STATE OF CONNECTICUT)
) ss.:
COUNTY OF NEW LONDON)

MARY DOE, being duly sworn deposes and says:

1. I reside at 43 Franklin Street, New London, Connecticut, and I am eligible for Medicaid through the Connecticut Department of Social Services.

2. I am 19 weeks pregnant and want to have an abortion. I am making this Affidavit to intervene and for a temporary restraining order to restrain the implementation of the Hyde Amendment.

3. I am 19 years old. I am not married. I have 4 children, aged 5 years, 4 years, 3 years, and 11 months old.

4. On July 29, 1977, I went to the office of Dr. David Bingham at 159 Sachem Street, Norwich, Connecticut, to request an abortion. He informed me that a new law may prohibit any federal or state reimbursement for abortions except those necesary to save the life of the mother and that they cannot admit me to the hospital to do this operation unless payment to the hospital is made in advance.

5. I cannot afford to pay for an abortion myself, and without Medicaid reimbursement, I cannot obtain a safe, legal abortion.

6. I have been told by Dr. Bingham that he can schedule an abortion for me if the Hyde Amendment does not go into effect and they are assured of reimbursement.

7. If I am unable to obtain an abortion at the hospital, I will try to end the pregnancy in any way I can.

8. If I am unable to end the pregnancy, I believe I may take my own life.

MARY DOE (not my real name)
/s/ Mary Doe

Sworn to before me this
29th day of July, 1977
Norwich, New London County, Connecticut

/s/ Harry Swetsburg
HARRY SWETSBURG
Notary Public

July 29, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ.

CORA MCRAE, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., DEFENDANT

AFFIDAVIT

STATE OF CONNECTICUT)
) ss.:
COUNTY OF NEW LONDON)

Dr. David B. Bingham, being duly sworn, deposes and says:

1. I am a member of the class of doctors in this action.

2. I am engaged in private practice at 159 Sachem Street, Norwich, Connecticut.

3. I have examined Mary Doe and find she is 19 weeks pregnant. I feel an abortion is medically necessary for her because of an overt depression with suicidal thoughts and because I believe she would try to terminate the pregnancy herself if unable to obtain a safe abortion.

4. If a restraining order is not obtained and the Hyde Amendment goes into effect, I will not be able to do an abortion on Mary Doe because I will be unable to admit her to the hospital without guaranteed payment for the hospitalization.

5. I feel that without an abortion Jane Doe risks serious and permanent health problems if she is forced to carry the pregnancy to term. She is not covered by the Hyde Amendment, however, because I believe I could pre-

vent a suicide, and could prevent fatal complications of a self-induced abortion.

DR. DAVID B. BINGHAM
/s/ Dr. David B. Bingham

Sworn to before me this
29 day of July, 1977
Norwich, New London County, Connecticut

/s/ Harry Swetsburg
HARRY SWETSBURG
Notary Public

July 29, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ.

CORA MCRAE, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., DEFENDANT

AFFIDAVIT

STATE OF MINNESOTA)
) SS.:
COUNTY OF RAMSEY)

JANE DOE, being duly sworn deposes and says:

1. I reside at 1007 Grove St. Brainerd, Minnesota 56401, and I am eligible for Medicaid through the Minnesota Department of Social Services.

2. I am eight weeks pregnant, and want to have an abortion. I am making this Affidavit to intervene and for a temporary restraining order to restrain the implementation of the Hyde Amendment.

3. I am 25 years old. I am married with four living children. Following the birth of my third child in November of 1976, I developed a serious case of phlebitis from which I have not completely recovered. Carrying another pregnancy to term would greatly aggravate this condition and increase the risk of blood clots to the lung.

4. On July 29, 1977, I went to the Fertility Control Clinic at St. Paul-Ramsey Hospital, St. Paul, Minnesota to request an abortion. They informed me that a new law prohibits any federal reimbursement for abortions except those necessary to save the life of the mother

and that they cannot afford to do this operation free for me.

5. I cannot afford to pay for an abortion myself, and without Medicaid reimbursement, I cannot obtain a safe, legal abortion. According to the doctor, Dr. Jane E. Hodgson, without an abortion I might suffer serious and permanent health problems.

6. I have been told by the Fertility Control Clinic that they can schedule an abortion for me if the Hyde Amendment does not go into effect and they are assured of reimbursement. Without Medicaid I would have to deprive my children of the actual necessities in order to pay for the procedure.

/s/ Jane Doe
JANE DOE

Sworn to before me this
29 day of July, 1977

/s/ Carol J. Muellner
CAROL J. MUELLNER
Notary Public
Ramsey County
My Comm. Expires Nov. 1, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ.

CORA MCRAE, ET AL., PLAINTIFFS

v.

JOSEPH A. CALIFANO, JR., DEFENDANT

AFFIDAVIT

STATE OF MINNESOTA)
) ss.:
COUNTY OF RAMSEY)

DR. JANE E. HODGSON, being duly sworn, deposes and says:

1. I am a member of the class of doctors in this action.

2. I work at the Fertility Control Clinic, St. Paul-Ramsey Hospital, St. Paul, Minnesota.

3. I have examined (Jane Doe) and find she is eight weeks pregnant. I feel an abortion is medically necessary for her because of recent phlebitis.

4. If a restraining order is not obtained and the Hyde Amendment goes into effect, I will not be able to do a free abortion on (Jane Doe) because I will receive no reimbursement.

5. I feel that without an abortion (Jane Doe) risks serious and permanent health problems if she is forced

to carry the pregnancy to term. She is not covered (or I don't think she is covered) by the Hyde Amendment, however, because her life is not endangered.

/s/ Jane E. Hodgson, M.D.
JANE E. HODGSON, M.D.

Sworn to before me this
29 day of July, 1977

/s/ Carol J. Muellner
CAROL J. MUELLNER
Notary Public
Ramsey County
My Comm. Expires Nov. 1, 1978

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

STATE OF CONNECTICUT)
)
COUNTY OF)

Dr. Jane E. Hodgson, being duly sworn, deposes and says:

1. I am a named representative of the class of doctors in this action.
2. I am engaged in teaching and clinical practice at St. Paul-Ramsey Hospital, St. Paul, Minn.
3. I have examined 15 yr. old Ann Moe, a resident of Minnesota. She is 11 weeks pregnant. Her family is currently receiving medical assistance and is unable to pay for an abortion.
4. While she might qualify for Medicaid under the exemption for statutory rape, she became pregnant more than two months ago. I do not know what "prompt" reporting means; furthermore the patient refuses to report because of her desire to protect her boy friend.
5. The increased risks of pregnancy in the young teenager are generally known (increased incidence of toxemia, hemorrhage, caesarian section, prematurity, etc.) However I don't believe I could certify as to her life endangerment as required by 1977 Hyde Amendment.

6. I have called the family physician who referred her to me. He is not willing to state that "severe and long lasting physical health damage" would result from the pregnancy. Therefore she cannot be certified under the new 1978 Hyde Amendment.

7. The patient has spent most of the past 3 years in adolescent psychiatric wards and correctional institutions. There have been repeated episodes of running away, poor school attendance, and a diagnosis of schizophrenia.

8. I feel an abortion is medically necessary for Ann Moe because of the increased physical risks of pregnancy for a teen-ager as well as the increased mental risks for one with her unstable past. I believe a compulsory pregnancy would result in severe and long lasting mental health damage.

9. However I am unable to certify her under either the 1977 or 1978 Hyde Amendments standards. I cannot obtain two physician certificates certifying that severe and long lasting physical health damage would result if her pregnancy were carried to term. And even if I could, the interpretation of her application by the Minnesota Medical Assistance Program, Department of Public Welfare is very uncertain to me. On 12-21-77 the Department of Public Welfare rejected my application for abortion of an 18 year old victim of juvenile rheumatoid arthritis already the mother of one. Her application was supported by letters from two physicians as well as the Mayo Clinic. (See attached rejection slip). Whether the Department of Public Welfare is applying 1977 or 1978 standards is uncertain and their interpretations of each law have been inconsistent and arbitrary.

10. While Ann's age (15) should entitle her to come under statutory rape in Minnesota, I am unaware of the exact requirements.

11. Because the St. Paul-Ramsey Hospital will not extend credit to Ann Moe without the assurance of Medic-

aid payment, she will be unable to obtain an abortion and will suffer irreparable harm.

12. I have used a pseudonym for the above name patient in order to preserve her privacy rights.

/s/ Dr. Jane Hodgson
DR. JANE HODGSON

Sworn to before me this
4 day of January 1978.
STATE OF MINNESOTA
COUNTY OF RAMSEY

/s/ Berniece F. Wersal
BERNIECE F. WERSAL
Notary Public, Ramsey County, Minn.
My Commission Expires Feb. 6, 19..

AUTHORIZATION REQUESTS TO: Minnesota Medical Assistance Program, Department of Public Welfare, Box 30159, St. Paul

[illegible] AUTHORIZATION

CLAIM PROGRAM INTERVIEW CONTROL NUMBER

TYPEWRITER ALIGNMENT
USE CAPITAL LETTERS ONLY

PROVIDER ID # 2038611 | OWN REFERENCE # 477996 3 | DATE SUBMITTED 10/07/77

[illegible]
[illegible] E. HODGSON

[illegible]
[illegible]0 JACKSON STREET

[illegible]
[illegible]. PAUL, MN. 55101

PRIOR AUTHORIZATION # 0860844

[illegible]

PATIENT'S MEDICAL ASSISTANCE NUMBER 62 2 000 034 2440 101

SEX F | BIRTHDATE 03/11/59

[illegible]

SERVICE NAME	SERVICE CODE	PROPOSED CHARGE	APPROVED	DENIED	AUTHORIZED CHARGE
TERMINATION OF PREGNANCY		$400.00		X	00.00

TOTAL NUMBER OF LINES USED	TOTAL PROPOSED CHARGES	TOTAL AUTHORIZED CHARGES
	400.00	00.00

EXPLAIN MEDICAL NECESSITY FOR EACH PROCEDURE BELOW

SEE ATTACHED

[signature] 12-21-77
[illegible] (For Department Use Only)

X [signature] Hodgson
Provider's Signature

SUBMIT ALL COPIES TO ABOVE ADDRESS

[SEAL]

SAINT PAUL-RAMSEY HOSPITAL
AND MEDICAL CENTER

Saint Paul, Minnesota 55101
612-221-3718

October 7, 1977

Department of
Obstetrics & Gynecology

Ismail Barrada, M.D.
Charles H. Blomquist, Ph.D.
William F. Dickes, M.D.
Laura E. Edwards, M.D.
Erick Y. Hakanson, M.D.
Jane E. Hodgson, M.D.
Michael F. Koszalka, M.D.
Gary T. Lundborg, M.D.
Bonnie J. Stickles, M.S.N., C.J.

To whom this may concern:

Re:

The above 18 year old patient has been a victim of juvenile rheumatoid arthritis which has incapacitated her to the extent that she required tutoring at home during the last two years of schooling. In November of 1976 she was delivered by cesarean section of a term pregnancy. During her pregnancy she was incapacitated most of the time.

At the present time she was found to be 20 weeks pregnant by ultrasound. Due to menstrual irregularities she did not suspect that she was pregnant until two weeks ago, on 9-26-77, when she was diagnosed as being pregnant at the Mayo Clinic, 3 mo. Subsequently an ultrasound done at St. Paul-Ramsey revealed a 20 week gestation. The patient is requesting interruption of pregnancy on the basis of her pre-existing medical condition. Letters are enclosed from her physician, James E. Brown, as well as a copy of a medical evaluation at the Mayo Clinic written on June 1, 1976.

If this pregnancy is to be terminated, it must be done so immediately because of the advanced stage of the pregnancy.

/s/ Jane E. Hodgson, M.D.
JANE E. HODGSON, M.D.

JEH:mr
Enclosures: 2

Proud, M.D.
Ahrend, M.D.
Brown, M.D.

1515 CHARLES AVENUE
SAINT PAUL
MINN.
55104

October 6, 1977

Dr. Jane Hodgson
640 Jackson Street
St. Paul, Minnesota 55101

Re:

Dear. Dr. Hodgson:

The above named patient has been intermittently under my care for some time. She suffers from chronic active rheumatoid arthritis. This has necessitate usuage of several drugs including Indocin on a regular basis. It is noteable that this drug is contraindicated in pregnancy. It is my understanding that the patient is presently pregnant. I feel that her chronic disease and drug therapy make the pregnancy inimical to both her and the baby's future welfare.

Sincerely

/s/ James E. Brown
JAMES E. BROWN, M.D.

JEB/DHB

[MAYO CLINIC COPY]

June 1, 1976

3-202-951
Harold R. Mundahl, M.D.
1703 Selby Avenue
St. Paul, Minnesota 55104

Dear Doctor Mundahl:

Miss [name deleted] was seen at the Mayo Clinic from May 14, 1976, through May 26, 1976, for an evaluation of her arthritis. Shari does have rheumatoid arthritis which has been present the last three years and currently her knees and feet were giving her the most trouble. She was having one to two hours of morning stiffness. She has been homebound the last two years and has not gone to school, but has received tutoring at home. Her program has consisted of aspirin 6 to 8 tablets a day and she has been on Sterazolidin, Indocin, and Motrin without success and has been on four or five short courses of a cortisone preparation.

Her weight was 125 pounds and blood pressure in the left arm was 100/60. She had mild acne about the face and a warty eruption over the right third toe. The uterus was enlarged 2½ times the normal size. There was synovitis of the elbows, right wrist, right third metacarpohalangeal joint bilaterally and the right third proximal interphalangeal joint and the left second and fourth proximal interphalangeal joints. There was synovitis of the knees and a loose body distal and lateral to the right patella. There was synovitis of the ankles and and metatarsophalangeal joints of the feet. X-ray of the knees did not reveal any bony changes. The hemoglobin was 10.5 mg. per cent (normal 12 to 15) with diminished mean corpuscular volume at 67, normal 84 to 99. The flocculation test for rheumatoid factor was reactive at a titer of 1:40. The erythrocyte sedimentation rate was elevated at 34 mm. in one hour (normal up to 20). The following laboratory tests were within normal limits: electrocardiogram, chest x-ray, urinalysis, white blood count 8,200, platelet count 376,000, serum

protein electrophoresis normal, cervical Papanicolaou smear negative, antinuclear antibody negative, ART serology nonreactive, potassium 3.8 mEq. per liter, calcium 9.3 mg. per cent, glucose 79 mg. per cent, alkaline phosphatase 82 units per liter, serum glutamic oxalacetic transminase 9 units per liter, uric acid 2.9 mg. per cent, and creatinine .8 mg. per cent.

[Name deleted] was instructed in a program of physical therapy and advised to take Ascriptin 3 tablets four times a day for her rheumatoid arthritis. It will continue to be important for her to get an extra amount of rest. The situation at this time is complicated by the fact that she is pregnant. Dr. L. A. Aaro, gynecologist, evaluated [name deleted] on two occasions and on May 26, 1976, he felt that she was at about 10 to 12 weeks gestation, the fetal heart tones were detected and the ultrasound beta scan confirmed the pregnancy.

Because of the pregnancy, I would not consider any other modalities of treatment for the rheumatoid arthritis other than rest, physical therapy, and Ascriptin. If her feet continue to give her difficulty it might be reasonable for her to have metatarsal bars placed on her shoes. If we can be of any further assistance, please contact us.

Sincerely,

D. L. CONN, M.D.

DLC:tjp

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

STATE OF CONNECTICUT)
)
COUNTY OF)

ADDENDUM to affidavit of 1-2-78 regarding Susan Roe.

What I have said regarding the uncertainties of interpretation of both the 1977 and 1978 Hyde Amendments by the Minnesota State Welfare Department, applies equally well to Susan Roe. In her case I could not certify that an immediate second pregnancy would be "life-endangering" nor could I obtain two consultants who could certify to "long lasting and serious physical health damage". And if I did obtain such written opinions, they have had no apparent effect upon the final interpretation by the State Welfare Department. (based on my experience with rejection of case referred to in affidavit regarding Ann Moe.)

/s/ Jane E. Hodgson, M.D.
JANE E. HODGSON, M.D.

Sworn to before me this
4th day of January, 1978
STATE OF MINNESOTA
COUNTY OF RAMSEY

/s/ Berniece F. Wersal
BERNIECE F. WERSAL
Notary Public, Ramsey County, Minn.
My Commission Expires Feb. 5, 19..

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

STATE OF CONNECTICUT)
) ss.:
COUNTY OF)

Susan Roe, being duly sworn, deposes and says:

(1) I am a Minnesota resident and am receiving Medical Assistance.

(2) Due to contraceptive failure, I am 15 weeks pregnant and want to have an abortion. I am making this affidavit to intervene as a representative class member.

(3) I am 19 years old and am a Native American. I am not married and I have one child 4 months old.

(4) On December 30, 1977 I went to the office of Dr. Jane Hodgson to request an abortion. She informed me that unless I would suffer severe and longlasting physical harm I would not qualify for a Medicaid abortion under the new federal law which went into effect on December 10, 1977. Because I was 15 weeks pregnant, I have been informed that my abortion must be in a hospital.

(5) I cannot afford to pay for an abortion myself, and without Medicaid reimbursement I cannot obtain a safe, legal abortion.

(6) If I am unable to obtain an abortion I cannot go back to finish high school or obtain any kind of employment or control of my life. Furthermore I am fearful of becoming an abusive parent, like some of my friends, if a second pregnancy is forced upon me.

(7) If I am unable to obtain an abortion I believe I will suffer severe and longlasting mental damage which will not only ruin my life, but which will be detrimental to the future health of my child.

/s/ Susan Roe
SUSAN ROE
(Not my real name)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

STATE OF CONNECTICUT)
)
COUNTY OF)

Ann Moe, being duly sworn, deposes and says:

1. I am 15 year old Minnesota resident and am eligible for Medicaid thru my mother who is receiving Medical Assistance.
2. I am 11 weeks pregnant and want to have an abortion. I am making this affidavit to intervene as a representative class member.
3. I am in the 10th grade of school, I do not feel ready to become a mother nor do I want to get married.
4. On January 3rd, 1978 I went to the office of Dr. Jane Hodgson to request an abortion. She informed me that unless I would suffer severe and long-lasting physical health damage, I would not qualify for a Medicaid abortion under the new federal law which went into effect on December 10, 1977. She informed me that under the new federal law Medicaid will reimburse for victims of rape or incest when they are promptly reported, and that I might fit under statutory rape because I am only 15 years old.
5. I was not aware of this law and did not know that I was to report the sexual intercourse to the police or

to a public health service agency. I do not know what a public health service agency is.

6. I would not want to report my boyfriend for fear the police would contact him and he would harm me. Also I do not know what "promptly" means, nor would I want to give my name for fear of publicity.
7. I have spent much of the past three years in psychiatric hospitals and correctional institutions.
8. Neither I nor my mother can afford to pay for an abortion and without Medicaid reimbursement, I cannot obtain a safe, legal abortion.
9. If I am unable to obtain an abortion, I believe I will suffer severe and longlasting mental damage which will not only ruin my life but which will be detrimental to the future health of a child.

/s/ ANN MOE
ANN MOE
(Not my real name)

Sworn to before me this
4 day of January, 1978
with my full knowledge that this
signature is that of a fictitious
name, and not the real name of the
individual—witness of the signature
solely.

STATE OF MINNESOTA
CITY OF SAINT PAUL
COUNTY OF RAMSEY

/s/ BERNIECE F. WERSAL
Notary Public, Ramsey County, Minn.
My Commission Expires Feb. 5, 19...

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF NEW YORK

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

STATE OF CONNECTICUT)
) ss.:
COUNTY OF)

Jane E. Hodgson, M.D., being duly sworn, deposes and says:

(1) I am a named representative of the class of doctors in this action.

(2) I am engaged in teaching and clinical practice at St. Paul-Ramsey Hospital at 640 Jackson Street, St. Paul, Minn.

(3) I have examined Susan Roe, a 19 year old native American, and find she is 15 weeks pregnant by ultrasound determination. She is currently on Medicaid and cannot afford to pay for an abortion. Susan was delivered a full term pregnancy on August 22, 1977 having been forced to drop out of school and seek Medical Assistance. Her boy friend, a native American, was also unemployed and unable to help her financially. In spite of contraception Susan conceived for the second time approximately 4 weeks after the birth of her first child. Conception at such a time is extremely rare. Due to breast feeding and total menstrual irregularity she was unaware of the 2nd pregnancy until this week. Upon learning that she is now 15 weeks pregnant she states that she would be physically and mentally unable to care for a second child and that under such circumstances she would be unable to finish high school and find employment.

(4) I feel an abortion is medically necessary for Susan because the resulting emotional and mental trauma of an immediate second child would ruin her life.

(5) It is also possible that severe physical damage could result from such a short interval between pregnancies. Because of insufficient time for uterine involution to take place, risk of complications will be higher than in the usual pregnancy particularly as regards premature labor or low lying placenta (placenta previa).

(6) I am not sure whether she will fit under the current Medicaid restrictions which allow for severe and long lasting physical harm but not for the mental or emotional trauma.

(7) Because she is 15 weeks pregnant, hospitalization is required. Because the hospital will not admit her without assurance of Medicaid payment, she will be unable to obtain an abortion and will suffer irreparable harm, mental, emotional and possible physical damage as well.

(8) I have used a pseudonym for the above named patient in order to preserve her privacy rights.

/s/ Jane E. Hodgson, M.D.
JANE E. HODGSON, M.D.

State of Minnesota
County of Ramsey

Subscribed and sworn to before me
this 2nd day of February, 1978.

/s/ L. R. Mikeworth
L. R. MIKEWORTH

[Illegible]
[Illegible]
My Commission Expires Sept. 26, 1980

UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1804 (JFD)

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

PLAINTIFF-INTERVENORS
AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THERESSA HOOVER, being duly sworn, deposes and says:

1. I reside at 90 LaSalle Street, New York City. I am also the Associate General Secretary, the Chief Executive Officer, and an *ex officio* member of the Board of the Women's Division of the Board of Global Ministries of The United Methodist Church (hereinafter Women's Division), whose offices are located at 475 Riverside Drive, New York, New York. I make this affidavit in support of my motion and that of the Women's Division to intervene as plaintiffs in this action on behalf of itself and the membership of United Methodist Women.

2. The Women's Division is the policy making body of United Methodist Women, which has a membership of 1.2 million women in this country and its territories. The Women's Division is composed of 75 members including 40 representatives nominated by the jurisdiction organizations of The United Methodist Women and elected to membership by the Jurisdictional Conferences (regional)

of The United Methodist Church; 5 presidents of the jurisdiction organization of United Methodist Women; 7 representatives elected by the Board of Global Ministries (1 Bishop, 2 clergy, 2 laymen and 2 laywomen); 13 members elected by the Women's Division; and 10 at-large members invited to membership by the Women's Division in order to assure inclusiveness according to race, socio-economic status and age.

3. The Women's Division decided to seek to become a plaintiff-intervenor in this lawsuit in pursuit of our policy and commitment to preserve religious and conscientious freedom in the matter of abortion, as expressed in our "Resolution on Abortion Rights" adopted in April, 1975 (Exhibit A) and in the "Resolution on Responsible Parenthood" of The United Methodist Church adopted at its 1976 General Conference (Exhibit B). Our commitment to the freedom of conscience in this matter was first made explicit in 1969 when the Women's Division of the then Board of Missions called for the removal of abortion from the criminal code and placement of its regulation under standard codes of medical practice. We have carried that commitment forward as a founding member of the Religious Coalition for Abortion Rights which was organized, as expressed in its Statement of Purpose "To build public awareness of the principle that in a pluralistic society the state should not embody in law one particular religious or moral viewpoint on which widely differing views are held by substantial sections of the religious community."

4. We share the views expressed in The United Methodist Church's "Resolution on Responsible Parenthood" and in the testimony of Dean J. Philip Wogaman, expounding the origin and tenets of that teaching, that "each couple [and each woman] has the right and the duty prayerfully and responsibly to control conception according to their circumstances" and that "the path of mature Christian judgment may indicate the advisability of abortion" where "continuance of a pregnancy . . . endangers the life or health [including 'physical, mental and emotional health'] of the mother, or poses other

serious problems concerning the life, health or mental capability of the child to be."

5. We recognize that the permissibility, advisability and/or necessity of abortion according to circumstance is a matter about which there is diversity of view within as well as beyond our membership, and is a determination which must be ultimately and absolutely entrusted to the conscience of the individual before God. Thus we affirm the fundamental Protestant tradition which respects the right of the Protestant to differ even from the Protestant view and therefore that the Church may not dictate individual choice. Likewise we affirm that the right to choose in a matter such as abortion is an essential component of religious liberty, and, therefore, that the state may not seek to foreclose or burden that choice but must remain neutral.

6. We believe that the battle waging in our nation today to restrict and eliminate this right to abortion is an attempt "to enforce one particular religious belief on those who believe otherwise." (1975 Resolution). This belief, diametrically opposed to our own, views developing human life as a human being and abortion *per se* as immoral, and even tantamount to murder. We respect the rights of those who hold this belief; indeed there are some among our membership who interpret their faith in this way. This country, however, was founded on the principle that no religious belief should be imposed on those who believe otherwise. As the Women's Division, we have a special duty on behalf of our Church and our membership, to resist the attempt of any segment of the population to impose its religious beliefs on all women. Our duty is heightened when the crushing and intolerable blow of religious legislation falls exclusively on poor women.

7. The original Hyde Amendment and the continuing resolution challenged in this case, which severely restrict the occasions for Medicaid or other federal reimbursement for abortion, are founded on and impose on poor women, in slightly compromised form, the restrictive religious belief on abortion, advancing and attempting to

enforce this religious view to the detriment of the United Methodist view.

8. As it affects poor women, these restrictions burden the right of poor women freely to exercise their religion with respect to abortion by foreclosing or burdening their ability to choose abortion over childbearing. For women of the United Methodist faith, the Hyde Amendment impedes exercise of the right and duty to make a decision consistent with the priciples of responsible parenthood. The absence of federal funding for abortion, while funding is supplied for pregnancy and childbirth, has the effect of forcing and pressuring the indigent pregnant woman in the direction of bearing an unwanted child, whether because safe, legal abortion is completely or seemingly inaccessible to her, or because the risk to her very life in self-aborting or obtaining an illegal abortion is too great to run. The pressure the Hyde Amendment exerts upon poor women to resign themselves to unwanted childbearing is fundamentally inconsistent with the teachings of Responsible Parenthood. The other effect of this restriction which makes poor women "targets for exploitation by unskilled abortionists working in unsanitary and illegal facilities" is intolerable butchery and victimization, likewise inconsistent with the ethical teachings of our faith and God's design.

9. The membership of the United Methodist Women includes women who are poor, Medicaid eligible and of childbearing age. On information and belief, there are among the membership at the present time, pregnant Medicaid eligible women who, as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment and the resulting and comparable state laws or rules.

10. The membership of the United Methodist Women also includes, in addition to myself, women who pay federal and other taxes who strenously oppose the use of their tax funds thus to manipulate the conduct of poor women in accordance with a religious view alien to them,

and who oppose the added human and social cost as well as the expenditure of tax monies the federal abortion funding restrictions require to pay for the continuation of coerced, unwanted pregancies, and for the treatment of medical complications from illegal or self-induced abortions and/or from the continuation of coerced, unwanted health- and life-threatening pregnancies, and for other additional expenses created by the restrictions.

11. The attached complaint raises the same questions of law and fact as contained in plaintiffs' amended complaint and as heard in the proceedings in this case.

/s/ Theressa Hoover
THERESSA HOOVER

SWORN TO BEFORE ME THIS
4TH DAY OF JANUARY, 1978.

/s/ Jewel J. Tillis
JEWEL J. TILLIS
NOTARY PUBLIC
JEWEL J. TILLIS
NOTARY PUBLIC, State of New York
No. 31-4633663
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

76 Civ. 1804 (JFD)

CORA MCRAE, ET AL., PLAINTIFFS

—against—

JOSEPH A. CALIFANO, DEFENDANT

PLAINTIFF-INTERVENORS
AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ELLEN KIRBY, being duly sworn, deposes and says:

1. I am a citizen of the United States, and reside at 138 Berkeley Place, Brooklyn, New York.

2. I am the Executive Secretary in the Administration of The Women's Division of The Board of Global Ministries of The United Methodist Church (hereinafter Women's Division), whose offices are located at 475 Riverside Drive, New York, New York. This position is elected by the Board of the Women's Division and carries responsibility for women's issues and concerns. I am also a member of the Park Slope United Methodist Church located at Sixth Avenue and Eighth Street in Brooklyn, New York. I pay annual federal, state and local taxes. I make this affidavit in support of my motion to intervene as a plaintiff in this case.

3. I decided to seek to become a plaintiff-intervenor in this lawsuit in pursuit of my commitment to preserve religious and conscientious freedom in the matter of abor-

tion, as expressed in our "Resolution on Abortion Rights" adopted April, 1975 (Exhibit A) and in the "Resolution on Responsible Parenthood" of the United Methodist Church adopted at its 1976 General Conference (Exhibit B). My denomination's commitment to the freedom of conscience in this matter was first made explicit in 1969 when the Women's Division of the then Board of Mission called for the removal of abortion from the criminal code and placement of its regulation under standard codes of medical practice. My denomination has also been a founding member and I have represented it on the Policy Council of the Religious Coalition for Abortion Rights which was organized, as expressed in its Statement of Purpose "To build public awareness of the principle that in a pluralistic society the state should not embody in law one particular religious or moral viewpoint on which widely differing views are held by substantial sections of the religious community."

4. My concern about this issue flows out of our concern for women, children and responsible parenthood and for securing and safeguarding the liberty of all women to decide whether or not to terminate a pregnancy in accordance with the teachings of their religions and the dictates of their conscience. I believe that the right to choose and have access to safe and legal abortion, just as to prenatal and childbirth care, is a right essential to my understanding of human liberation and fulfillment for women and all people in accordance with God's design.

5. I share the view expressed in the United Methodist Church's "Resolution on Responsible Parenthood" and in the testimony of Dean J. Philip Wogaman, expounding the origin and tenets of that teaching, that "each couple [and each woman] has the right and the duty prayerfully and responsibly to control conception according to their circumstances" and that "the path of mature Christian judgment may indicate the advisability of abortion" where "continuance of a pregnancy . . . endangers the life or health [including 'physical, mental and emotional health'] of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be." I view the permissibility, advisability and/

or necessity of abortion according to circumstances as a determination which must be absolutely and ultimately entrusted to the conscience of the individual before God. Because my belief is based on an understanding of the relationship between the individual and God, I feel that the intervention by government to foreclose or burden that choice interferes with and deprecates the practice and teaching of my religion.

6. I also believe that the battle waging in our nation today to restrict and eliminate this right to abortion is an attempt to enforce one particular religious belief on those who believe otherwise. This belief, diametrically opposed to my own, views developing human life as a human being and abortion *per se* as immoral, and even tantamount to murder. This belief is for some religions also rooted in the concept that sexual activity unintended for childbearing is sinful and that unwanted pregnancy is appropriate punishment. By contrast, my religion teaches that responsible and loving sexual relationships are a gift of God to be enjoyed independent of, as well as in relationship to childbearing.

7. The original Hyde Amendment and the continuing resolution challenged here which severely restrict the occasions for Medicaid reimbursement for abortion are founded on and impose on poor women, in slightly compromised form, the restrictive religious belief on abortion, advancing and attempting to enforce this religious view to the detriment of the United Methodist view.

8. As it affects poor women, the Hyde Amendment burdens the right freely to exercise one's religion with respect to abortion because it either forecloses or discourages the choice of abortion over childbearing. For women of The United Methodist faith, the Hyde Amendment impedes exercise of the right and duty to make a decision consistent with the principles of Responsible Parenthood. Restricting funding for abortion, while funding pregnancy and childbirth, has the effect of forcing and pressuring the indigent pregnant woman in the direction of bearing an unwanted child, whether because safe, legal abortion is completely or seemingly inaccessible to her, or

because the risk to her very life from self-abortion or obtaining an illegal abortion is too great to run. The pressure the Hyde Amendment exerts upon poor women to resign themselves to unwanted childbearing is fundamentally inconsistent with the teachings of responsible parenthood. The effect of this restriction is to make poor women "targets for exploitation by unskilled abortionists working in unsanitary and illegal facilities." This situation is intolerable to me in light of the ethical teachings of my religion. It is also intolerable to me that this pressure should be brought to bear on any woman who believes an abortion to be necessary whether for religious or nonreligious reasons.

9. I strenuously oppose the use of my tax funds thus to manipulate the conduct of poor women in accordance with a religious view alien to some and I oppose the added human and social cost as well as the expenditure of tax monies the federal abortion restrictions require to pay for the continuation of coerced, unwanted pregnancies, and for the treatment of medical complications from illegal or self-induced abortions and/or from the continuation of coerced, unwanted health- and life-threatening pregnancies, and for other additional expenses created by the restrictions.

10. The attached complaint raises the same questions of law and fact as contained in plaintiffs' amended complaint and as heard in the proceedings in this case.

/s/ Ellen Kirby
ELLEN KIRBY

Sworn to before me this 4th day of January, 1978.

/s/ Jewel J. Tillis
JEWEL J. TILLIS
Notary Public, State of New York
No. 31-4638663
Qualified in New York County
Commission Expires March 30, 1978

[SEAL]

RESOLUTION ON ABORTION RIGHTS
Of The Women's Division
Of The
Board of Global Ministries
United Methodist Church

As members of the Women's Division of the Board of Global Ministries, we are deeply disturbed over the increasingly bitter and divisive battle being waged to place an amendment in the U.S. Constitution to ban abortion.

We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise.

In 1969 the Women's Division first took the step of calling for the removal of abortion from the criminal code, putting its regulation instead under standard codes of medical practice. In 1970 this position was adopted by the General Conference and in 1972 it was reaffirmed in the Social Principles of our denomination, which state that "in continuity with past Christian teachings, we recognize tragic conflicts of life which may justify abortion". This position is in accord with that of many other major Protestant denominations and Jewish faith communities.

When the Supreme Court decision of January 1973 made possible the legal option of abortion in all states, we hoped that all those concerned with this problem could turn their attention to seeking to remove conditions in our society which might create a need for abortion, such as faulty contraceptives, lack of education on responsible sexuality, lack of access to family-planning services, tragedies such as rape, incest and genetic defects.

Now we find, instead that vast amounts of energy, money and time are going to the attempt to use national legislation and even the Constitution to force continuation of pregnancies, no matter what the human or social

cost. Various kinds of legal and social pressures are being used to intimidate doctors and hospitals who are involved in abortion.

Amendments which prohibit or restrict abortion rights are being proposed for a number of health related bills. If such legislation is approved the most direct effect would be against the poor who cannot afford to travel to the places where safe legal abortions are available. These women then become targets for exploitation by unskilled abortionists working in unsanitary and illegal facilities.

We affirm our belief in freedom of conscience on this matter. We are concerned about those who have been bitterly attacked for seeking to deal openly with this issue in a spirit of compassion. Although we respect the right of other religious individuals and groups to disagree on the matter of abortion, we earnestly make the appeal that our differences be embued with a spirit of ecumenical relationships.

CONCLUSION

The struggle raging over abortion centers largely on religious and philosophical differences rather than on the types of social factors which normally fall within the purview of government. We, therefore, affirm once more our belief that where there is no religious or moral consensus in our society, the attempt to embody one particular moral viewpoint in the United States Constitution does serious injury to our cherished freedom of religious belief and conscience.

Adopted at Spring meeting, April, 1975.

UNITED METHODIST CHURCH

Excerpts from resolution on

RESPONSIBLE PARENTHOOD

. . . We affirm the principle of responsible parenthood. . . .

Each couple has the right and the duty prayerfully and responsibly to control conception according to their circumstances. . . .

When, through contraceptive or human failure, an unacceptable pregnancy occurs, we believe that a profound regard for unborn human life must be weighed alongside an equally profound regard for fully developed personhood, particularly when the physical, mental, and emotional health of the pregnant woman and her family show reason to be seriously threatened by the new life just forming. . . .

We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such case, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court Decisions. We encourage women in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion.

We therefore encourage our churches and common society to:

7. Safeguard the legal option of abortion under standards of sound medical practice, and make abortions available to women without regard to economic status. . . .

Adopted by the 1976 General Conference, the United Methodist Church.

ATTACHMENT A

NUMBER OF REPORTED MEDICAID ABORTIONS, BY STATE AND JUSTIFICATION FOR ABORTION, FOR WHICH FEDERAL MATCHING FUNDS SHOULD BE AVAILABLE UNDER P.L. 95-205, OCTOBER 1, 1978-DECEMBER 31, 1978

State [1, 2]	Total Number of Abortions Reported	Justification for Abortion: Life of Woman Endangered	Justification for Abortion: Severe and Long Lasting Damage to Health of Woman	Justification for Abortion: Rape or Incest
TOTALS	780	645	86	25
Colorado	49	49	0	0
Connecticut	29	29	0	0
*Georgia	3	0	2	1
*Idaho	5	0	5	0
*Illinois	59	15	41	3
Iowa	4	3	0	1
*Kansas	3	3	0	0
*Maine	1	0	1	0
*Maryland	43	35	7	1
Massachusetts	24	[3]	[3]	[3]
*New Jersey	42	42	0	0
New Mexico	3	1	0	2
New York [4]	55	54	1	0
*Ohio	386	373	12	1
*Oklahoma	19	18	1	0
*Oregon	22	6	2	14
*Pennsylvania	21	9	12	0
*South Carolina	2	1	0	1
*Texas	2	2	0	0
*Vermont	3	0	2	1
*Virginia	4	4	0	0
Wisconsin	1	1	0	0

*Indicates those states from which written confirmation has been received.

[Attachment A continued on page 142]

[Attachment A continued]

[1] The following 30 States/areas reported that no [illegible] ing the criteria of P.L. 95-205 were financed during this period:

Alabama	Louisiana	North Dakota
Alaska	Michigan	Puerto Rico
Arkansas	Minnesota	Rhode Island
California	Mississippi	South Dakota
Delaware	Missouri	Tennessee
District of Columbia	Montana	Utah
Guam	Nebraska	Virgin Islands
Hawaii	Nevada	Washington
Indiana	New Hampshire	West Virginia
Kentucky	North Carolina	Wyoming

Arizona does not have a Medicaid program.

[2] Data are not available at this time for the State of Florida due to data processing problems.

[3] Justifications for abortions not reported by Massachusetts.

[4] New York data are partial. Several counties have not reported to the State.

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS BY STATE AND REPORTING PERIODS DURING 1978

	Total	Feb. 14, 1978-June 30, 1978	July 1, 1978-Sept. 30, 1978	Oct. 1, 1978-Dec. 31, 1978
Total	2,421 [1, 2, 3]	810	831 [2]	780 [1]
Alaska	94	94	0	0
Arkansas	9	6	3	0
Colorado	170	81	40	49
Connecticut	106	47	30	29
Florida	176 [1, 2]	66	110 [2]	[1]
Georgia	12	3	6	3
Idaho	20	7	8	5
Illinois	264	124	81	59
Indiana	4	2	2	0
Iowa	4	0	0	4
Kansas	3	0	0	3
Kentucky	3	3	0	0
Maine	3	1	1	1
Maryland	144	42	59	43
Massachusetts	24	0	0	24
Mississippi	12	12	0	0
New Hampshire	1	0	1	0
New Jersey	98	34	22	42
New Mexico	5	2	0	3
New York	149 [3]	51	43	55 [3]
North Carolina	9	8	1	0

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS BY STATE AND REPORTING PERIODS DURING 1978 (Continued)

	Total	Feb. 14, 1978-June 30, 1978	July 1, 1978-Sept. 30, 1978	Oct. 1, 1978-Dec. 31, 1978
North Dakota	1	1	0	0
Ohio	811	98	327	386
Oklahoma	38	10	9	19
Oregon	31	7	2	22
Pennsylvania	108	34	53	21
Rhode Island	1	0	1	0
South Carolina	21	12	7	2
South Dakota	1	1	0	0
Tennessee	19	19	0	0
Texas	14	7	5	2
Utah	2	0	2	0
Vermont	6	0	3	3
Virginia	9	2	3	4
West Virginia	3	3	0	0
Wisconsin	45	33	11	1
Wyoming	1	0	1	0

[1] Data not reported for quarter ending in December for Florida.

[2] Revised report to be submitted for quarter ending in September for Florida after HEW review.

[3] Data for quarter ending in December are incomplete for New York State. Some counties have not reported.

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS, BY JUSTIFICATION FOR ABORTION, FEBRUARY 14, 1978-DECEMBER 3, 1978

Justification for Abortion	Total	Feb. 14, 1978-June 30, 1978	July 1, 1978-Sept. 30, 1978	Oct. 1, 1978-Dec. 3, 1978
Total Number of Reported Abortions	2,421 [1]	810 [1]	831	780 [1]
Life of Woman Endangered	1,857	546	666	645
Severe and Long Lasting Damage to Health of Woman	385	146	153	86
Rape or Incest	61	24	12	25

[1] Figures will not add to totals because Alaska did not report the reasons for 94 abortions in the February 14-June 30 period, and Massachusetts did not report the reasons for 24 abortions in the October-December period.

[Dr. Jane E. Hodgson:]

[43] Q Is there a standard medical definition of the phrase, when the life of the mother would be endangered if the fetus were carried to term?

A There is a very ambiguous statement. It actually means very little to me.

If you take it in the strip sense of the word, there would be no such cases essentially because in this day of modern medicine it is possible to get almost any woman through a pregnancy as far as her actual physical life is concerned.

[44] However, if you are simply talking about endangering her life then it is a matter of degree and what are you talking about—her physical life, mental, emotional, social life? There are any degrees of interpretation that are possible.

* * * *

[63] Q Now, going from the specific example to the general, and please feel free to refer to any particular condition that you feel makes your point and whether it is on this list, exhibit three, or anything else you want to tell us about, but isn't it a correct statement that with a woman who has a serious physical problem, be it her heart or respiratory system or renal system or muscular system or nervous system, isn't it true that you have to take such a patient during the course of a pregnancy and closely monitor that patient so that—

A Right.

Q (Continuing)—so that you can establish with a reasonable degree of medical certainty, not absolute certainty, not a wild guess, but with a reasonable degree of medical certainty whether the pregnancy is going to endanger the patient's life?

A Yes, with a reasonable degree of certainty.

* * * *

[99] THE WITNESS: In my medical judgment every one that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is [100] not wanted.

I in good faith, I would recommend on a medical basis, you understand, that, and it would be one hundred percent.

Q You are referring to medical necessity abortions that you would say are medically necessary?

A I think they are all medically necessary, not just one with hypertension, but the woman coming in applying, and most of them are necessary.

Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary because I am considering the woman's physical mental emotional and social and welfare and family and enviornment and all that.

* * * *

[107] Q Dr. Hodgson, I'm going to ask you only two questions:

The first one goes back to a hypothetical situation painted by the United States Attorney, and I am sure you don't remember it so I am going to try and repaint it:

He said supposing you do assume that the Hyde Amendment standard, the Hyde Amendment said or meant when the physical life of the mother is endangered, and he said let's assume that is the case, and then he said:

Supposing a woman comes in with a history of present and past cardiac failure.

Now let me ask you, given that situation just as clearly as he painted it, as clearly as that could be understood, is it possible that your determination as to whether or not a pregnancy would endanger this woman's physical life would change during the life of her pregnancy?

A Very definitely.

* * * *

[Dr. Johan Eliot:]

[416] Q Now, how many—again, if you have to give us a rough estimate, based on your experience, based on your knowledge, what percentage of abortions that would —say up to a few hours ago—would have been permissible under the Medicaid program, reimbursable under the

Medicaid program? What percentage will be reimbursable under the Hyde Amendment, as you now understand it to be implemented?

A As I now understand it, depending on where the estimate is being done, if it's the heart of the trade, it might be as high as two or three per cent. If it's in Ann Arbor, it would be less than one per cent.

* * * *

[438] Q And what I am saying is medically necessary abortion, you're quite correct, medically necessary abortion, does that mean that there was not a medically acceptable alternative to abortion?

A Not necessarily, no. Because as you have gathered from our previous conversation, I considered that a great majority of pregnancies can either be carried to term or not, depending on the desire of the woman in question. Only a very small, small proportion, less than one per cent, do doctors feel urgent with the need to urge upon the woman that she have it terminated.

* * * *

[461] Q So, would it be fair to say that if a woman does not want a child, for whatever reason, that that could enter into a determination: It might be medically necessary for her to have an abortion?

A This is certainly one of the factors that I considered. You know, if you make a list of things that figure into medical advisabilities—need, necessity; whatever the term—this is one of them.

* * * *

[Dr. Edward O. Rothchild:]

[683] Q Let's talk a minute about the words "medically necessary."

How would you define this phrase?

A My definition would be that Medical necessity would be something necessary to preserve the health of the patient.

[684] Q When you—and I use this phrase—are we using a generally accepted medical standard?

A Yes.

Q And within the context of determining whether a medical procedure is necessary, medically necessary for a given patient, what criteria would a doctor consider?

A I would say that a general factor such as the physical condition of the patient, the emotional status, the psychological status, familial status, the age of the patient—

* * * *

[832] Q Can you tell me any other field, any other medical, any other medical field, in which the hospital corporation renders elective services in such masses and substantial numbers?

A The whole field of surgery is, I would say—I [833] just tried to find this out two months ago. It ranges from 30 to 70% of surgical procedures are elective in our hospitals.

Q Can you tell us what other elective procedures there are?

A Most medical admissions are not elective. Most pediatric admissions for surgical are not electives.

Q Can you give me any examples at all, and I am talking about significant numbers, of elective procedures outside of abortion?

A Sure, hernias.

Q Is that considered elective or medically necessary.

A It certainly is considered—no, you want to—

Q Yes, I want to.

A —deal with a different generic use of the term. That is not elective in the sense of the definition of family convenience, whatever the words I have used before.

Q Yes, not medically necessary.

A Family planning, social or emotional convenience, no. Do I know if there are other elective procedures?

Q Elective in the sense of non-medically necessary, non-medically indicated procedures provided by the [834] hospital corporation in significant numbers?

THE COURT: The kind of things where they say: while we are in there, we might as well take out or thus and so.

MR. WASHBURN: Whether or not it is medically necessary.

THE COURT: If you have ever heard that expression.

MR. WASHBURN: And I would be indicating there that it would be something not medically indicated or necessary; any other, anything else you can think of?

A I would have to give that some thought. The fact that I can't come up with something right away doesn't mean that there aren't some things.

Q How about surgical procedures, any other surgical procedures? You have testified that abortion was a surgical procedure. Any other surgical procedures that are not medically necessary that are provided in such large numbers, hundreds of thousands? I guess you did treat abortion differently, didn't you, Doctor?

A Yes, but let me answer the first question.

Q I'm sorry, go ahead.

It was your silence that I thought indicated an answer.

[835] A My silence was that I was thinking. I tend to think by being quiet. I am confused a little bit as to the question, do we perform elective procedures?

Q Non-medically indicated procedures in large numbers in any other area.

A I am trying—I have to go down a whole list of services that we provide, and I would say, yes, we provide such things as training programs that are not medically indicated. We provide such things as community relations/services that are not medically indicated. I probably, if I gave it some thought, could come up with a lot of things that we provide that are not medically indicated.

Q Are those funded by Medicaid?

A I can't answer that question. I would say that they—as a matter of fact, they are. They are in the base reimbursement rate, yes, considered part of hospital operations.

Q Didn't you testify that the Medicaid standard was medical necessity?

A Oh, I said the Medicaid for procedures that are medical or surgical procedures are. Medicaid does fund non-medically indicated things. They do it all the time. The fund education. They fund training. They fund a whole bunch of things.

[836] Q Putting those things to one side and sticking for the moment to those things you testified to, can you think of any other medical procedure not medically necessary which was provided in large numbers by your corporation, other than abortion?

A I would have to say, no, but I would have to say no, conditional on me thinking about it a little more.

Q If the answer were no, would you have to concede that you treated abortion differently than other surgical procedures?

A Absolutely.

* * * *

[Dr. Christopher Tietze:]

[944] Q If the doctor were required to certify to a reasonable medical certainty that the pregnant woman would die during the course and as a result of her pregnancy, approximately what percentage of abortions now performed do you think would be done under Medicaid, if you can so approximate?

A I think—obviously I cannot put a precise estimate on such a figure, but I can try to take you to my thinking on the issue.

The formulation that you have proposed is one that is stricter than the preserved life formulation, stricter than the old law. Let's assume that it's the same.

[945] We have these 5,000 or 6,000 abortions in normal years, '63 and in '66 under the old laws. We know that a goodly number of the abortions at that time were obtained by a number of patients who weren't poor and we are discussing here the status of poor patients. In the New York experience, in 1962, the earlier year, about 90 percent of the abortions were obtained by private patients and then in the later expereince, '65-'67 which is something like 75 percent were obtained by private patients, and in Dr. Hall's paper were something like 85 percent were obtained by private patients. Let's take that figure being midway between 90 and 75. So, nonprivate or poor patients would represent about 15 percent, or something less than 1000 abortions per year compared with somewhere between 250,000 and 300,000 abortions

performed under Medicaid and related programs in 1966, so it would be on the order of one in 300.

In other words, the reduction would be about 99.7 percent, roughly one in 300.

* * * *

[946] A Yes, I would consider it so because I accept the definition of the World Health Organization which defines health as a state of physical, mental and social well-being and not merely the absence of a disease and disability.

If one accepts this standard, I think the Supreme Court's illustration is a very good illustration of what is medically necessary.

* * * *

[Dr. Seymour Romney:]

[1056] Q How significant is the patient's attitude towards the pregnancy in determining the medical necessity for an abortion?

A I personally think it's a critically important issue. It's very difficult to take a woman who's not well motivated and who does not understand what is entailed in assuming the physical responsibilities of pregnancy and expecting her to carry out medically determined situations unless she's well motivated and prepared to cooperate, participate, be seen for periodically ante-natal visits and be followed carefully, closely throughout the pregnancy.

Q Is a person's attitude toward treatment or toward a particular disability usually a significant factor in providing appropriate medical care apart from pregnancy?

A I'm not sure I understand that.

Q You stated that a pregnant patient's attitude towards pregnancy is a significant factor in determining whether or not an abortion would be medically necessary?

A Right.

Q Is a patient's attitude toward treatment for other conditions also a significant factor? Is this general practice that the attitudinal factor is important in determining whether a form of treatment is medically necessary?

A I think it wouldn't. The answer to that is, [1057] yes, it would not.

* * * *

[1195] Q You said very early this morning that the Hyde amendment language was a crisis intervention standard. Would it be fairer to state that the medically necessary standard is a preventive medicine standard contrasted with the phrase "crisis intervention"?

A I think that's closer to reality, yes.

* * * *

[1209] If you want to translate what the genesis might be to a patient who is pregnant and who says she is engaged in an unwanted pregnancy and may be motivated to do something about that pregnancy which will get her into serious trouble—

Q I am taking that out of the picture. That is something that I will get to where they are threatening to go to a non-professional abortionist. I'm excluding that from this question. I will get to that.

I am just saying, are there recommended treatments for obesity other than abortion.

A Dieting is probably the best.

* * * *

[1210] Q Is the same true as to malnutrition, is it a recognized treatment to have abortion for malnutrition?

A No, you provide adequate nutrition.

Q And is abortion a recognized treatment for anemia?

A Again we are in a situation now where if you translate this into population it is simpler for me to say that you get the necessary protein to cure.

* * * *

[1251] Q In general, medical practice, let's say in gynecology and obstetrics, is it a general principal for medical intervention that where a small risk to life exists and a safer form of treatment is desired by the individual also exists that would avert that small risk to life that intervention is medically necessary?

A I think—

Q As a general rule?

A I think we have discussed—we are discussing the possibility—we are discussing a theme which has come up here on several occasions today. Preventive medicine

is much better than crisis medicine. If you can avoid getting into the crisis, if you can avoid the serious complications, it is highly desirable that that avenue be explored.

* * * *

[Dr. Bernard J. Pisani:]

[2176] Q In your experience at this time are life-threatening indications in pregnancies well known to Board-certified obstetricians and gynecologists in the United States?

A Yes, I feel that certified obstetricians and those who have been well trained are in a position to recognize life-threatening conditions in a woman during pregnancy.

* * * *

[2178] Q In your experience have life-endangering indications in pregnancies been a subject of serious study throughout the term of your practice by obstetricians and gynecologists throughout the United States?

A Yes, they have been a very primary concern for all obstetricians.

Q Are they fully familiar with the life-endangering—life-threatening conditions in pregnancies, [2179] that is based on the studies and their continuing efforts to reduce the maternal mortality rates?

A I would think based on their studies and their knowledge and their experience, these are the factors that I think most directly led to the improvement of the majority of women in maternity.

* * * *

Q Dr. Pisani, I'm now showing you the language of the Hyde Amendment.

I would ask you to read aloud these four lines with, "none," and ending with, "term."

A I read from page 5:

"None of the funds contained in this act shall be used to perform abortions, except where the life of the mother would be endangered if the fetus were carried to term."

That is the end of the sentence.

Q Dr. Pisani, does the language of the Hyde Amendment, especially with the use of the words, "Life [2180] endangering," refer to a matter well understood by obstetricians and gynecologists throughout the United States?

A I would be my opinion that it does refer to matters that are hazardous to the life of the mother that obstetricians understand and should be prepared to meet.

Q And have these matters been the subject of continuing study and consultation by the medical societies of the various states, including New York?

A Yes, they have been by the specialty societies that are directly concerned with obstetrics.

Q And Doctor, if you were asked to certify in good faith with a reasonable degree of medical certainty whether in a particular case the life of a mother would be endangered if the fetus were carried to term, would you be able to do so in an individual case one way or the other?

A Yes, I would be able to make a determination about the state of that mother.

Q So that if there were no life-endangering indications, you would be able to either refuse to certify or certify as to that fact, and if there were indeed a life-endangering indication present in the individual patient, you would be able to certify to that?

A I would consider it a part of my competency to [2181] be aware as to that.

Q And has that been true throughout your practice as an obstetrician and gynecologist?

A My continuing study and observation and experience I feel has contributed to my fund of information and knowledge.

* * * *

[Professor Aaron M. Schreiber:]

[2240] Q Is there a prevailing viewpoint in traditional Jewish law on the subject of abortion?

A The subject of abortion is a very complex one in Jewish law and there are many opinions—have been expressed by Jewish rabbis and I am referring now to

both those who follow the Jewish tradition and since the arise of the Reform Movement I am referring to Orthodox rabbis, who have continued to follow the Jewish tradition.

There have been many viewpoints running the gamut. However, in summarizing them, I would disagree very strongly with Rabbi Feldman's presentation of what the viewpoint of traditional Jewish law is with regard to abortions. In that I feel that Rabbi Feldman has not properly stated or has understated the views of those authorities who maintain that abortions are prohibited or that abortions indeed constitute a homicide.

For example, I read carefully through Rabbi Feldman's testimony and I saw no mention made of the viewpoint of current contemporary rabbis, who are regarded as legal authorities. It is the nearly unanimous opinion of American Orthodox religious and legal scholars that abortions are prohibited, except in a case where the mother's life is clearly threatened, and that such abortions are homicide.

[2241] Now, for example, there was a statement made by Rabbi Moisha Feinstein, who is I believe the present president of the Union of Orthodox Rabbis of the United States and Canada, but, in addition, is regarded by many Orthodox Jews and perhaps by most, as the Dean of American Rabbis in the realm of decision making and Jewish law.

And he has repeatedly referred to abortion as homicide or as a murder. He's used the Hebrew term.

Similarly, the Rabbinical Council of America, which is a very large organization of Orthodox rabbis, has taken a strong stand against abortions, against permissive abortions or abortions where the mother's life is not threatened. The same true is true of a number of other Orthodox Jewish rabbinical organizations.

Indeed, I think it would be extremely difficult to find any acknowledged Orthodox Jewish authority in the United States who would say that abortions are permitted unless the mother's life is threatened. The same applies outside the United States.

For example, Rabbi Yosef, who is one of the two chief rabbis in Israel has taken a strong stand against the Israeli statute that had been proposed and was since adopted which permits abortions in a number of cases. The same was true of the other chief rabbi, Rabbi Goran. [2242] All of the deans of the Jewish Orthodox theological schools, which concentrate on Jewish law in Israel, came out very strongly against that proposed Israeli abortion statute and participated in mass demonstrations against it. And branded it as murder, homicide.

I did not find adequate reference to these views in Rabbi Feldman's testimony. There is no reference at all to the American rabbis, who are familiar with the context of current American society. I also found that on—I thought he underplayed the views of rabbis who are not living but have lived in the past, of those who maintained that abortions are prohibited.

There are many of the most eminent rabbis and legal scholars, of the first order, who took a very firm position against abortions and these range from the authors of the work called the Tosafot, including Rabbi Elijah Misrachi, Ezekiel Lantau, one of the foremost decision makers in the 1800's in Europe, such as Weinberg lived in Switzerland during the latter part of his life, Rabbi Unterman, who was one of the former chief rabbis of the State of Israel, Rabbi Chaim Solovitchik—would be an acceptable—Rabbi Mayer Don Pletski, Rabbi Chaim Ozer Grodzenski, and numerous other authorities who are considered among the very first rank of Jewish decision makers and authorities [2243] on Jewish law who came out very strongly against abortions.

I found this underplayed in his testimony. One other point that I think should be made in this context, namely, that in considering the viewpoint of Jewish law, one should realize that until fairly recently, works on Jewish law were not always readily available. So that when a Jewish legal authority or rabbi had a question of abortion before him, he might have access to some works but often not have access to them. In fact, may have heard of them but not been available on—and in some cases

not even heard of them because they were published in other countries.

It is only the current authorities who are the ones who have access to all of the works on abortion and legal opinions written in all past centuries. And these have existed, these current Orthodox rabbis have examined all of these opinions and yet, overwhelmingly their position is that abortions are prohibited in Jewish law, except in the case where the mother's life is threatened. However —this is the unanimous opinion of rabbis today.

I also think that the impression that Rabbi Feldman created in his testimony, at least in my mind, was that what he did is act as a sort of an accountant or bookkeeper in trying to count up various legal opinions and then to add them up and conclude in his opinion that those who [2244] permitted abortions, even where the mother's life was not threatened, with normal—were more numerous than those that prohibited it.

I think it's fallacious to do that. One cannot simply count numerically. One must take into account the standing and status of the decision makers, their degree to which they're accorded recognition, their access to other works, as well as the context under which they rendered their decisions and the society in which they lived and the factors that they had to consider in rendering their decisions. A mechanical counting of authorities is certainly not the way to do it.

In any case, I would disagree with this accounting. I don't think it can be clearly stated that those who permit abortions are on the majority. In any case, I think it's wrong simply to do it in that way.

Q Now, before you read the testimony of Rabbi Feldman, had you ever heard any pronouncement by an Orthodox, Conservative or Reformed Rabbinical organization which stated in some words that abortion would be the religious or obligation under certain circumstances of a Jewish woman, where her life was not threatened?

A No, I have not heard of such pronouncements, neither by Orthodox rabbis, nor by Conservative or even [2245] Reformed.

[2251] Q Is there any passage in Scripture which he would want to draw our attention to?

A Yes. There are a number of passages I'd want to draw your attention to but I would like to just preced that with a description that I may overlook in the course of going into the passages themselves; namely, the issue raised before as to whether abortions were mandatory or not under Jewish religious tradition and based upon the Scriptural passages and portions of the Talmud which I will get to very shortly, it is very clear to me that Rabbi Feldman is in error—if this is what he means to state in his testimony—that abortions are mandated by Jewish religious law and tradition even where the mother's life is not threatened.

If that is what he means to say, it is clearly [2252] erroneous because even those Jewish authorities who have permitted abortions have done so only with the greatest reluctance and after a huge amount of soul searching and attempting to find some rational, some principle to permit abortions. But they have only done so, permitted abortions reluctantly. They had not mandated it and said it is required with the sole exception where the mother's life is threatened. But otherwise, it has simply been a very, very reluctant permission. Even when given, normally conditioned and restricted by numerous restrictions rather than a simple case of a mandate.

Number two, involved with this—I think it is important to realize that even those authorities who have permitted abortions in given cases or stated a view that it may be permitted, nevertheless, there is still a very strong feeling that from the point of view of morality that abortions are immoral. That is, one basically may clarify it as legal factors and moral factors—though that is a gross over-dimplification—but those who have permitted it feel that abortions are moral except that in certain circumstances they may be permitted in their viewpoint.

* * * *

[2259] Q Was there another point in Rabbi Feldman's testimony where he said that the decision of whether or not to abort was up to the woman under Jewish law?

A Yes.

Rabbi Feldman stated that the decision on abortion in Jewish law is up to the woman. I very strenuously disagree with that. I believe that that is importing into Jewish law some non-Jewish notions, particularly the notion of the Row case cited by the United States Supreme Court.

In Jewish law a person's body is not regarded as belonging to him or to her but to God.

Therefore, a person may not for example decide that that person wishes to commit suicide and say: It's my body. I will do with it as I wish.

In the same way, where the issue is abortion, neither the life of the fetus or the body of the mother is regarded [2260] as belonging to her nor that the decision is simply in her discretion. It is simply not so.

This principle that a person's body does not belong to that person is widely accepted. In fact, it was even carried very far.

* * * *

[Dr. Fred E. Mecklenburg:]

[2312] Q Dr. Mecklenburg, I would like to show you a copy of the so-called Hyde Amendment. These four lines, I would like you to read it aloud.

A "None of the funds contained in this Act shall be used to perform abortions, except where the life of the mother would be endangered if the fetus were carried to term."

Q Dr. Mecklenburg, would you be able to certify in good faith with a reasonable degree of medical certainty with respect to whether or not a woman's life would be endangered if the fetus were carried to term in a given case?

A Yes, I would.

* * * *

EXCERPTS FROM MEDICAL TRANSCRIPT

[Dr. Johan Eliot:]

[389] Q Now, if you are asked what you think—suppose I ask you what you think is meant by the term abortions which are medically necessary because the life of the woman would be endangered by carrying the fetus to term, carrying the pregnancy to term. How would you understand that? What do you think that means?

A My understanding of those—of that phraseology, putting the emphasis on endangering the life of the mother if the pregnancy is carried to term, is that that encompasses a very small group of women indeed. Because with the skills of modern obstetrics and internal medicine, just about any pregnancy can be carried through with the lifesaving and life preserving and treatment procedures that are now available.

There are exceptions, and I can think of a few in my past experience where a termination was truly necessary to save the life of a woman. But they are really quite rare.

* * * *

[390] Q Could you give me some examples of an abortion which you would regard as medically necessary?

A Yes.

If I may use the examples that I have abstracted. I have abstracted five cases here of women who would specifically fall into this second category, women for whom I felt an abortion to be medically necessary, but in whom there was really no doubt that the pregnancy could be carried to term without endangering the life of the woman.

The first I pulled from our files was a 19 year old woman who was threatened with a knife and was raped by an unidentified man in one of Ann Arbor's less traveled residential areas.

Because there had been a series of rapes recently, she was terrified and afraid of being hunted out and attacked

if she attempted to report the rape. So she waited, and in two months pregnancy symptoms forced her to seek help.

Because she was currently jobless and without income [391] she was helped by our clinic to apply for Medicaid.

The abortion was completed without complications. She was given substantial supplemental counseling both before and after the procedure to assist her with emotional adjustment with this really traumatic experience.

Q Now, you regarded that abortion as medically necessary?

A Yes, indeed. This would have greatly disturbed her personal life and her own personal mental health. This pregnancy was utterly repugnant to her and she was in a definitely emotionally disturbed condition. She was greatly relieved by the termination.

Q However, you did not believe it would have endangered her life to continue that pregnancy?

A No, I do not.

Q Now, let's go on to your second case, Doctor.

A The second case that I cited was that of a 33 year old mother of three children who was furloughed from our State Mental Hospital for weekends at home with her family.

After nine months of treatment in the hospital for a sickly depressive state, for which she had been under treatment for several years, although she had been prepared for her home furlough by the fitting of a diaphragm, and [392] used it conscientiously insofar as she knew, she became pregnant.

Apparently at the time of her second visit at home, because the family had low income and the husband was only intermittently employed, the family was already receiving welfare assistance and was eligible for Medicaid.

The patient was much disturbed at the discovery of her pregnancy. And her physicians at the State hospital judged it definitely inadvisable for her mental health to try to carry this pregnancy to term.

So with Medicaid support "an" uneventful abortion was carried out again with careful counseling.

She recovered quickly and well. And the course of her general recovery of her mental illness seemed to be progressing satisfactorily when we saw her for her regular check-up two months later.

Q And you regarded that abortion as medically necessary?

A Yes, indeed.

Q But you did not think it was necessary—well, let's put it this way. You did not think it was necessary because her life would have been endangered by carrying the pregnancy to term?

A No.

[393] Q Now let's go on to your third case, Doctor.

A This is the case of a 30 year old woman who found herself greatly perturbed by the care of two retarded children.

She came to us urgently requesting an abortion because she found herself unexpectedly pregnant despite the use of an intrauterine device.

She feared that this pregnancy might result in another retarded child, and that even if the child were normal she feared that the burdens of care for the two older retarded children would deprive her of the time and energy to give the new child the physical care and loving attention needed for normal birth.

Her pregnancy was terminated uneventfully with Medicaid's financial assistance. And she was provided with information and referral for a tubal ligation at her request.

Q Now, you regarded this abortion as medically necessary, Doctor?

A Yes, indeed.

Q Not in order to—not because it would have endangered the life of the woman to carry it to term?

A No. This was for her own and for her family's mental and physical health. But in no way was her life [394] endangered by the pregnancy.

Q Recently, Doctor, there has been some new information developed with respect to a risk of a IUD and a woman who may accidentally become pregnant with the IUD in place. Are you familiar with that research?

A Yes.

Q Let me ask you this: Do you feel that if a woman became accidentally pregnant with an IUD in place, that would be an indication for an abortion?

A This is where the differing emphasis and opinions of different physicians have to be brought to bear.

I am aware of the dangers and I have seen two such patients myself. But they constitute among all of the women who become pregnant with an intrauterine device in place, they constitute a very small percentage. And, therefore, while I would—we have a definite policy and I would follow that policy of counseling the woman to have the intrauterine device removed, and if it could not be removed without terminating the pregnancy, to terminate the pregnancy. That would be my counsel. But I would have to classify such a case on a statistical basis as preserving her health rather than an imminent threat of danger to her life if she continued the pregnancy.

[395] Since the overwhelming majority of women with an intrauterine device in place do carry the pregnancy to term without difficulty.

Q Does that mean, Doctor, that you might to have to counsel these women differently, depending on whether she were Medicaid eligible or whether she was a woman with private means?

A Yes, it would be—I would not be able to offer her the option of the advised abortion under these circumstances, speaking perfectly honestly.

Now, there are others who would interpret this differently, and it poses a great conundrum because the Food and Drug Administration requires of me that I give this counsel for the health and safety of the woman. Yet I am aware of the statistics, knowing that most of the women would come through the pregnancy safely, even if the intrauterine device has to be left in place because it can't be reached.

Q All right.

Let's go on to your fourth case, Doctor Eliot.

Do you want to tell us something about that?

A This was a case of a young woman, 16 years old who came to our clinic in great distress with the quiet knowledge and permission and support of her mother; but

[396] without the knowledge of her father and her foster brother.

She requested an early abortion with deep and bitter regret as the pregnancy was the result of a momentary lapse of self-control in her relation to her foster brother, who was not a blood relation and with whom she had fallen deeply in love.

She recognized that there was no possibility at all of carrying through with a marriage in this situation, and that if the pregnancy were known to her father and foster bother very severe emotional reactions would ensue, which were likely to split the family asunder with great mental anguish for all.

The family was not well off and was registered already for Medicaid assistance, so that it was possible to terminate this pregnancy in a confidential manner with Medicaid financing.

The mental health of this young woman, both present and future, and the integrity of this family were preserved.

Q Now, Doctor, you regard that abortion as medically necessary?

A Very necessary.

[397] Q But not because it would have endangered the woman's life to carry the pregnancy to term?

A No. This was a supremely healthy young woman.

Q All right. Let's go on to your next case, Doctor.

A This was the case of a 14-year-old deaf young woman with juvenile diabetes, who was brought by her mother for termination of a pregnancy that resulted from the transient affair with a young man who took advantage of this socially handicapped young woman.

And I say parenthetically that young deaf women are indeed socially handicapped and quite characteristically subject to sexual abuse on this account.

While the diabetes was under adequate control and a pregnancy could quite possibly have been successfully managed with good and expensive obstetrical care, there was clearly increased risk to this young woman. Statistically her age and her diabetes were likely to yield a

higher rate of complications in the pregnancy, especially for the infant involved.

It, nevertheless, appeared that her infant could have been delivered with very good care.

There would in addition have been [398] interruption of her schooling and impairment of her emotional adjustment, as she was greatly distressed by the reality of her situation, and very much wanted the abortion.

It was carried out with Medicaid assistance, since her mother was divorced and already receiving Welfare assistance.

Q Now, you regarded that abortion as medically necessary?

A Quite so.

Q But not because it would have endangered the young woman's life to carry it to term?

A Not because I could have said with any element of certainty at all that it would have endangered her life.

Q Do you often have patients with diabetes, Doctor?

A Occasionally.

Q And do you feel that that is usually medically necessary to perform an abortion in that situation?

A This depends a great deal on the individual case, and obviously on the desires of the woman involved.

[399] Q And—

A I'm sorry.

Q Go ahead.

A The severity of the diabetes is quite important. Young people who have diabetes all have severe diabetes. So that the degree of risk was greater for this woman than it would be for other women who were older and whose diabetes was of less severe degree.

* * * *

[451] A I have seen it. I have lived through with a niece, this traditional pattern of following through in the krittenden home. I can't remember the spelling.

THE COURT: Krittenden, I think it is.

THE WITNESS: Yes, I think it is, yes.

A (Continuing)—Krittenden home which used to be in the sense an alternative to abortion before abortion was available.

But there was no question one half of my brother's family knowing, and the other half not. They knew. They agreed and they withdrew her from where she was and sent her to a distant city, namely mine.

I saw her weekly through the long and tedious pregnancy, saw her through her bitter tears when she gave up that child.

Q To adoption?

A To adoption.

[452] And I have seen her through her ill adjustment to that particular situation ever since.

* * * *

[Dr. Donald Sloan:]

[1629] Q Are you associated with a clinic that's concerned with the psychosomatics of pregnancy?

A My function is also as part of the employment at the medical school is that I am Director of Psychosomatics in that department.

Q How—

A I should add another hospital, by the way, which I left out, which is part of the New York Medical College, Metropolitan Hospital of New York, a city affiliate of the Flower Fifth Avenue.

Q Is that where the psychosomatics clinic is located?

A Yes.

Q How long have you had the position of director of that clinic?

A About 10 years, almost. Since 1970, '69-'70.

Q Would you tell us about your education, beginning with medical school?

A Medical school was down the street, Brooklyn Downstate, and from there, State University of New York. From there, for internship at Albert Einstein, and a residency program at the Temple University Health Schience and Center in Philadelphia. I was—post-graduate training and clinic [1630] seminar courses in psychosomatics, and I've done workshop seminar training for my specialty in psychosomatics and sex therapy, reproductive biology institute. Doctor's degree in St. Louis.

* * * *

[1632] Q You said that that's where you had experience in your present specialty which is psychosomatics. Would you describe some of the psychosomatic conditions that you observed among the young girls at the Florence Crittendon Home?

A These young women were of varying age; as a matter of fact, from all gradations, from late teens to upwards of 20s and 30s. We had a pretty good cross-section, although most were younger women, younger 20s, teenagers, late teens, as I said. We were obviously going into a situation that was apparent to those who worked there of young women who, of course, were automatically troubled, coming from homes from around the country, literally, and some, of course, came without consent or the knowledge originally of their parents.

We anticipated and it was born out by our interviewing these young women, we're going to be dealing with a certain situation which lead well to an emphasis on the anxieties and proportion of many of the psychological problems of pregnancy.

[1633] Q Would you describe many of the women in the Florence Crittendon Homes as bearing unwanted pregnancies?

A That's the way you would have to label it, if you put a label on people like that, surely.

Q Did you observe psychosomatic complications of pregnancies?

A Oh, yes.

* * * *

[1634] Q As you mention these, would you give a brief description of what they are?

A Hyperemesis is excessive vomiting and the nausea of pregnancy which becomes a casual symptom in many young women—many women, not these people in particular. However, it becomes classified as hyperemesis when it affects bodily function. We were obviously responsible for giving our patients well-being, so we treated even the most casual of symptoms. Hyperemesassis becomes important when we feel, number one, it might have a deleterious effect on the pregancy.

Number two, a deleterious effect on the health of the pregnant women from the standpoint of nutrition, standpoint of intake, from the standpoint of personal attitude and care about her pregnancy which could lead to another number of side effects which would become untoward.

Q Is hyperemesis something that can continue throughout pregnancies?

A It can, and when it becomes severe enough, does. In cases of more severity, indeed it does do that, becomes a problem later on. I say it's more common earlier in pregnancy only because it's more known and, let's say, more [1635] superficial, but nethertheless it can become quite severe.

Other psychosomatic, so-called psychosomatic conditions of pregnancy revolved around a thing called ptyalism. Ptyalism is a condition of—which is marked by the symptom of excessive salivation. That's the symptom of the pregnant woman and we attribute it through vast amount of research—now attributed to a strictly psychosomatic condition. There's nothing organic. Women have experienced excessive expectoration in addition to the—due to what is manifested by some anxieties of the pregnancy.

Another one, by the way, along that same line concerns a certain type of anemia, caused by the certain psychosomatic condition of starch intake. Literally, I don't mean foodstuffs, I mean laundry starch intake. The Argo starch syndrome which has been collequially called because of the popular brand Argo, has been associated with these young women and others in similar conditions in which they resort to almost like an addict to an intake of this laundry starch, which is taken and chewed like chewing gum, and if you've ever tried it, you can't imagine how you would want to do it. It becomes quite pleasant in intake, becomes addictive.

What it does, and where it causes a threatened situation to their health is that it completely misconstrues their nutrition and metablism of foodstuffs and severe [1636] anemia is the result. It can be a very serious condition. I've seen some women with this starch situation which they chew on Argo starch with anemia such that their blood levels would be one half of normal, severe anemia, remarkable.

Q Doctor, is that a condition or phenomenon that's generally associated with poverty, or is that one which is enhanced by anxiety?

A It has been described in the poverty areas and has been attributed, I think, perhaps unfairly to a need for foodstuffs, nutrition, but when studied more, it's now more associated, the availability—it's been associated with the poverty population, but perhaps it's dynamics is not for foodstuffs, but because of the problems of the unwanted pregnancy, things along those lines now.

Q Let me just interrupt for a minute. When you talk about psychosomatic effects of pregnancy, are you relating that to, or would you just explain the dynamic relationship of that to the women's attitude towards her pregnancy?

A I guess we'll start with the definition that we use of psychosomatic condition. I guess the word gives it away. Sematic for body, and psycho for the psyche. It's defined simply as a condition manifested by a bodily symptom, organic symptom that has manifested itself in its causation or etiology in the psyche or mental aberration. Pregnancy is [1637] not the only place it's seen, of course. Just for clarification, an ulcer, asthma in young women, in children, psoriasis, but there has to be a lesion. It's very commonly—and perhaps after the psoriasis and the internist and his ulcer problems, we, in obstetrics, probably if not first, see the most psychosomatic conditions in medicine because we deal with problems of pregnancy in unwanted cases. We are probably becoming experts in that area because of that, and this is why psychosomatic clinics like my own are almost always associated when they exist. There are only a few in the country with women and their pregnancies. It's a result of our business.

Q You said that you see them associated with unwanted pregnancies. Does it—

THE COURT: Is it specific to unwanted pregnancies or just higher incidents there, or what?

THE WITNESS: It's not specific to the unwanted pregnancy, but there is certainly a much higher incidence in the unwanted pregnancy, yes.

Q Is it enhanced, Doctor, in the cases that involve the consciously unwanted pregnancy as opposed to perhaps the consiously wanted but unconscious—

A True.

Q Unconsciously unwanted pregnancy?

[1638] A The answer to your question is yes.

Q In the Florence Crittendon Home, you were working there before the liberalization of abortion; isn't that correct?

A Yes.

Q Did you see a high incidence of psychosomatic problems associated with the unwanted pregnancies?

A Yes, I certainly did.

Q Can you make any estimate of the incidence?

A The percentage—well, I hate to get into the numbers game—to give numbers, but I think I can make the point by saying it's a vast majority, an overwhelming majority of young women. If I were to say all, to give you an idea what number I'm talking about, I would not be too far wrong. I can't talk in terms of absolutes, because someone will refute one case, but it's a very high percentage.

[1639] Q We were beginning to describe some of the conditions which are psychosomatic effects of unwanted pregnancies—

A Starch intake. There are three of them. There is certainly a wide range of more vague but certainly psychosomatic conditions—the pregnacies which we have classified in this more subtle area, low back pain, for want of a diagnosis, we sometimes are forced to make the diagnosis by system. We have no diagnosis for it, but there is a very severe low back pain syndrome, which is unassociated with any of the ordinary causations of low back pain, neuralgia, bursitis, arthritis, etcetera, or any injury, of course.

It cannot be attributed to the weight of the uterus, either. Therefore, treatment and absolution comes in dealing with a patient on a psychosomatic level, and we can help them—

Q Is that a condition which can be crippling to a woman during pregnancies?

A Surely. Again, we know that we have to play a role in dealing with these women when they dysfunction, when they can no longer in their pregnancies carry out what is her base, barest function of taking care of her family and herself.

[1640] It can become crippling. Like hyperemesis, we are more, shall we say casual, about someone who has an occasional nauseous syndrome because of its frequency, because we are also not at liberty to deal with mass numbers of patients who reflect their back pain.

Another important area are any of the withdrawal symptoms of pregnancy, so-called depressive states of pregnancies, which is lumped under for the psychosomatic doctor in the vast area of the anxiety and fears of pregnancies. The dynamics could fill a textbook, but it certainly is a common finding of the pregnant woman and one of the ones we see accentuated in dealing with the unwanted pregnant woman.

Then there's been, although I've seen many of these cases, the literature is dotted with reports from several years back and even more recently on the role of certain so-called serious problems of the late pregnancies—

THE COURT: What kind?

THE WITNESS: Serious problems. The ones I'm thinking of primarily are the hypertensive disorders of pregnancy, the old term, or the toxemias of pregnancy. There are boards of doctors who deal in nomenclatures, trying to remove the word and I am training myself not to say it. The condition we mostly see from the so-called toxemias, are pre-eclampsia, [1641] the second term is the eclampsia without the "pre". It is the stage before the eclampsia.

Q What is the eclampsia?

A Pre-eclampsia—eclampsia, from the latin word meaning sudden and that's how the Greeks first diagnosed it in Athens, when there was a sudden convulsion state a pregnant woman goes into.

I guess even today unfortunately, it is a high cause of maternal morality, the leading three or four—I think it is the cause, third, of maternal death throughout the world.

In those days, it was almost universal. The babies died and the woman died. We are more fortunate today, but it's a leading cause. It is marked by convulsive episodes marked by hypertension, marked changes in renal function causing vast amounts of albumin and protein to be excreted, a change in the protein levels of the blood to danger levels and marked fluid retentions, which can be quite discomforting in addition to being dysfunctional, abnoral in content.

The pre-eclampsia is simply a stage before that without the convulsions.

Q Is this something that occurs in late pregnancy?

A Yes, only occurs in late pregnancy, although [1642] the manifestations of it probably are beginning earlier. We think it is a condition caused by certain stress factors and we do know as little as we know about it, we are convinced today, and we treat it as such, that it is a placental disorder, that it is based and the basis for it being a psychosomatic condition, is that it has basis in placental blood flow.

The one universal pathologic finding, autopsy, when women die or we see the placentas later on from it, they are markedly infarcted, very low, their blood supply was cut and this is often associated with an anxiety retention.

We think there is a tie-in there. The statistical evidence comes from our own psychosomatic clinic, a very nice study done in the years when I got there. I did not originate the clinic. It's been started before I got there and I am proud to say, popular in demand in the sense it is more accepted in my ten years. A good paper came out of our own service in the 50's, early 60's, before I got there by my predecessor, who described and made a very interesting statistical analysis of women from the general metropolitan hospital population and their incidence of pre-eclampsia versus the women who we see through our psychosomatic services and who had conditions which would lend them to be seen by us with much higher incidences of pre-eclampsia. [1643] Statistically it is more now. I mention here that it is kind of a serious condition when it happens.

Q Is this something which is always predictable in the first trimester at the time, for example, when a woman maybe considering an abortion if she could get one?

A There are certain prodromal signs, when they are manifested and frequently can be alerting a physician.

Q Would you say that you could always predict that?

A Not always, no. Some of them are quite subtle. It is a late pregnancy symptom and actually the diagnosis of pre-eclampsia cannot even be made by definition, until the twenty-fourth week, which is the sixth or seventh month.

Before then, it is not a tenable diagnosis.

Q Are there any other conditions that manifest themselves later in pregnancy?

A Such as the pre-eclampsia?

Q That you would classify as psychosomatic?

A All the rest would manifest late in pregnancy, would be a continuation of the ones I have talked about already, of course. As they become more severe, more chronologically, there is a problem; the more increased, the poor balance, poor water retention, etcetera, but the key to the conditions later on in pregnancy, I think would [1644] have to be classified in areas of the true psychologic disorders of pregnancy. We are probably aware of certain changes coming up in women in late pregnancy which are manifested by the pressure of the pregnancy, the time involved, the weightiness, psychologically, carrying a fetus to term, the fears of labor and delivery are very real factors.

From Freud on down, it has been described as a very real tense and concerning moment for a women. These are all exaggerated by typical pregnancy roles. When you get involved in a situation when there is an unwanted situation, an unwanted pregnancy, all multi-folded, exaggerated.

Q Are you saying that labor and delivery itself can be more complicated for a woman who does not want to bear the child, than for a woman who wants the pregnancy?

A I can freely say that.

Q Can you describe some of the difficulties—

A Labor, delivery—

Q That associate with a woman's attitude toward bearing a child?

A I guess the major difficulties—let's go with difficulties and sequelae.

The prime difficulties that one as an obstetrician, taking a woman through and approaching the labor would be, [1645] number one, harmful to her labor, dysfunction labor, better yet, abnormal labor, which is what it really is, prolonged and, of course, prolonged labor is always a threat not only to the maternal well-being, but primarily to fetal well-being.

We do have a certain normal labor curve, that is to be acted upon and we try to fit within that percentile with a variation. That's the first thing we say.

Secondly, what concerns us is the changes and the ability of a woman to cooperate with voluntary labor contractions in the force of labor delivery. We count on our women patients being cooperative at this particular time to deliver a healthy, normal baby.

A pregnancy, essentially, is rather than pathology in broad terms, is really a task to be mastered. It requires help.

THE COURT: A task?

THE WITNESS: A task, a job to be done. It would require the woman's aid and assistance to carry out that in a sense. This is quite delayed and even denied us at that time which, of course involves then more doctor interference in women who are not able to cooperate and give us normal labors, the incidence, of course, namely, Cesareans, but operative deliveries, [1646] forceps, which always, if not often, add to maternal, fetal mortality.

Other problems in labor and delivery are problems we have associated with rupture of the membranes. This occurs very frequently, often, too early in women who are associating themselves with harmful labors. We like them to rupture during labor or just prior for the safety factor. We have seen a number of situations in some studies demonstrated for us, women approaching labor in a harmful fashion, abnormal fashion, have a higher

incidence of a premature rupture, which not only exposes the baby, but more to certain infections that force the physician to act more rapidly in delivery and, often again, become more operative.

Any time you interfere with the birth process, any time you take away from a normal, spontaneous vaginal delivery, you are adding a certain morbidity to it automatically by interference.

Now, certainly, I don't want to leave out the fears of anxiety that are expressed during a late trimester. Again, leading back to the grand old master, Dr. Freud, many of his early teachings and those of his schools, which I guess all existing psychologic [1647] schools today stem to some degree, talk about and have demonstrated quite clearly, concerns about excessive hemorrhage, excessive bleeding, fears of even death which are markedly expressed by young women and by women going into a labor delivery.

I guess if there is any time during a pregnancy that I would be concerned about a fear of death or a fear of loss of life during a pregnancy, would be during labor delivery. I teach my students to be particularly aware of their patients during this time and have them express it if they do.

There is a way of dealing with it and exposing it at this particular time.

* * * *

[C. Krauser:]

[1749] Q How many children do you have, Ms. Kauser?

A In all?

Q Yes.

A Five.

Q Have you ever had any unwanted pregnancies?

A Three.

Q Which of your children were unwanted pregnancies?

A The first three, ——— Illegible ....

Q How old were you when your first child was born?

A 16 and a half.

Q Why didn't you want that first pregnancy?

A I was still in the house of my mother and father being a young girl my mother didn't want me to have any children. I wasn't married.

Q Were you in school then?

A Yes.

Q What school?

A Morris High School, in the Bronx.

Q Were you able to continue school?

A No, I wasn't.

Q What did you do when you discovered you were [1750] pregnant?

A I asked some friends in the street how could I get rid of it before my mother found out I was pregnant.

Q What did they say?

A They gave me different remedies, Humfrey No. 11, bitter apple, catheter tube.

Q What did you do?

A I tried to use them but they didn't work.

Q How did you use them?

A The instructions on the bitter apple was to boil it and drink it. I did and it made me very sick. The catheter tube I tried to insert it. There was some bleeding but nothing happened. The Humfrey No. 11 I just heard bells ringing.

Q Did you know whether or not any of these things could hurt you?

A Well, at the time I really didn't care. It was that versus my parents.

Q Did any of the efforts to abort that pregnancy work?

A No.

Q What about your second pregnancy; you said that was an unwanted pregnancy as well; is that correct?

A Yes.

Q Why didn't you want that pregnancy

[1751] A Because I was married then and he wasn't working. I had lost my job and we didn't have an apartment. We only had one room with a bathroom outside in the hallway. We just couldn't afford a baby. We couldn't even hardly take care of ourselves.

Q What did you do then when you found out you were pregnant?

A I was given another remedy and tried that.

Q What remedy was that?

A Putting mustard in the bathtub, drinking green gin and Humfrey No. 11 again.

Q Did any of these work?

A No.

Q Did you try anything else; did you think of anything else?

A No.

Q What about your third pregnancy; I believe you said that was an unwanted pregnancy as well. What did you do about that?

A When I went to the pre-natal clinic they assured me I wouldn't have to bring the baby home but after the baby was born they told me I had to take it home and somebody would come out—

Q I'm not sure that I understand why. Was there [1752] something you asked of them?

A Yes.

Q What did you ask them?

A I told them the situation we are living under and where we were living at and that there was no place for another baby which would have made two babies.

Q Therefore, what did you want to do with that child?

A I wanted to put it up for adoption.

Q You wanted to put it up for adoption and then they told you that you had to bring the child home with you?

A They told me I could put it up for adoption at first. After the baby was born, I understood you never see the baby after the baby is born if you are going to put it up, but they brought the baby in to me.

I asked why was this and they said, "You have to take it home first and a worker would come out to see you."

Q How long did they leave the child with you?

A The baby was four months old.

Q When what happened?

A A lady came, knocked on the door, and said she came for the baby Krouser.

Q What did you do then?

A I told her no.

* * * *

[Dr. David Bingham:]

[475] Q And could you describe how that board functioned?

A That board functioned—it was a hospital committee that was set up in which members of various departments were to come on a rotating business, to sit on that board to decide to hear each of those cases and decide whether or not they should be approved, to be performed in that hospital.

Q And would you say that the decisions of that board were uniform or showed a uniformity?

A No, the decisions, based on my experience, were rather arbitrary.

* * * *

Q Could you describe the decisions, the nature of the decisions?

[476] A The nature of the decisions depended upon several factors.

First of all, the physician who happened to be requesting the abortions; secondly, the consultants that were chosen by that physician; lastly by the composition of the board itself.

There were several members who would not approve any abortions. There were others who were relatively liberal in their interpretation of what was life threatening and would approve larger numbers of abortions.

There were physicians, at least one physician, who would only approve an abortion if the woman agreed to be sterilized at the same time.

* * * *

[477] Q Could you describe some of the differences where one board or one doctor would approve an abortion and another would not?

A The great majority of requests were on a mental standard.

There were patients who came from the board who were psychotic and truly mentally ill and chronically

mentally ill. These women were more likely to be approved just simply on the basis of a very difficult position as to whether or not what they would do during a pregnancy, in terms of suicide attempts.

Other women came in and said they were depressed. Other women said they would commit suicide but the psychiatrist said that the patient was mentally sound and even though she said she might commit suicide, the psychiatrist, in his consultative report, would indicate the risks were small.

[478] Other psychiatrists, more available to those who have money, could choose multiple psychiatrists before coming before the board, might be much more liberal in their interpretation of what risk there was in suicide.

Q Were there doctors who disregarded all psychiatric testimony or all psychiatric opinion and did not consider psychiatric conditions to be life threatening?

A There were sufficient to use statistics that suicide rates in actual pregnancy, that the actual suicide is low.

Q Were there doctors who liberally interpreted psychiatric factors in terms of their life threatening capacity?

A Yes.

[479] Q And would you say that these beliefs were held in good faith by these different doctors?

A By all, by all of the physicians, I believe their judgments were in good faith.

Q Were these simple, easy discussions that were had in the medical committee?

A No, they were an emotional and psychological drain for every one of us involved almost every meeting. They were long drawn-out arguments which were based on really personal philosophy as well as medical judgment.

Q And you mentioned another factor when you talked about what the factors were that caused the committee to approve or disapprove. You said although the physician was, who recommended the abortion was one factor. What do mean by that?

A I meant it's very difficult to turn out the chief of the Department if he requests that one of his patients have an abortion. If one of the medical residents who saw

generally what are called house cases or welfare patients, it was less likely that they could be—at least in my opinion that they could be fairly hurt.

Q You also indicated that the consultants had an impact.

A That is right.

[480] Q Would you explain that.

A Some consultants felt that what you would consider significant danger to life in some opinions would be different than another consultant whose opinion would differ as to the significant danger even though they used the same statistics indicating that some women would die and some women wouldn't. To enlarge on that, if you are talking about an individual patient as to whether or not they will commit suicide during pregnancy, you can state that the actual rate of suicide would be low. If you are talking about a standard which I felt was necessary in my own personal feeling and tried to apply this to a class of women, I know that if we applied this standard and turned them all down, that we would have an occasional suicide, that women would die as a result of our decision. So that what I considered significant and what others considered significant might vary with the same statistics.

* * * *

[482] Q In your judgment, Dr. Bingham, is there a standard meaning to the concept of life endangering or to the term—if the pregnant woman's life would be endangered if the pregnancy were carried to term, is there a standard meaning to that phrase?

A No. There would—as a question of personal philosophy, that, as he mentioned, would differ among different doctors. My definition of risk to a patient, imminent risk, a patient who is now—enters the hospital [483] convulsing from severe myoeclampsia toxemia pregnancy as a patient, if she does not have her pregnancy terminated now, she and the offspring will die. And so those patients will have an imminent danger.

There are others who have a threatened danger. Diabetes, you have heard about. Hypertensives, patients with heart disease, I have seen some because of the pregnancy

be near death and yet we—I also practice obstetrics. I worked and have been able to generally salvage these patients. So that these by some standard would be considered to be a risk to the patient's health and life and by others not a risk to the patient's life.

The patient who comes to me as in the patient in my affidavit who states that she will terminate the pregnancy somehow if I am unable to bring her into our hospital, then to me that represents a risk to her life because I have seen patients who have died from self-induced pregnancy, not self-induced abortion.

Q Are you talking about Mary Doe who I believe is your patient?

A That is correct.

Q And is it your opinion that Mary Doe, that if Mary Doe doesn't have an abortion her life would be endangered?

A It is my opinion that her life would be in danger if she would not have the pregnancy terminated.

[484] Q And is that because she said in her affidavit that she might commit suicide?

A Frankly, in her case I think the risk of suicide is relatively low. She is depressed. She at age 19 has four children. She lives in very difficult circumstances. Her depression may become worse during the pregnancy, but I don't think that she is likely to end her life, because frankly I think she is going to end the pregnancy no mater what we do, and that while she might die from trying to terminate the pregnancy, even that is unlikely. She may permanently damage herself. She may require a hysterectomy to save her as we have had to do in the past, but the threat to her life is mostly from the threat that I am unable to admit her to the hospital, that she has stated, and I believe she was telling the truth, that she would try somehow or other to terminate the pregnancy.

* * * *

[485] Q What is the system for reimbursement in Connecticut now under Medicaid?

A We must sign an affidavit that the pregnancy termination is medically necessary and then this is approved by the State. And if it is approved for payment, I am then able to have the patient admitted to the hospital or to the clinic for the procedure.

Q If you thought that your judgment would not be questioned by the State, would you certify in good faith that Mary Doe's life was in danger if she had to [486] carry her pregnancy to term without a legal abortion?

A In this case, if I were so requested to sign an affidavit, I believe that I would sign it in good faith at this—that she is a threat to herself if this pregnancy is not terminated.

Q If the Hyde Amendment went into effect, do you think you could do that abortion?

A I have a real question because people who will approve pre-payment on the State level have not stated whether or not they consider that standard an adequate standard. They have the right, supposedly, of turning us down if they don't accept it. And if they do not reimburse, guarantee payment, the hospital will refuse admission for this patient because prepayment at this hospital is required.

Q Now, could you do this abortion under the present system of medically necessary as the standard in Connecticut?

A Currently, the papers have been signed. Prepayment, pre-authorization as a medically necessary abortion has been requested and should be obtained so that she has not yet obtained the abortion, but I would expect no problem with payment as a medically necessary procedure.

Q And would there be any problem with the hospital?

[487] A At the present time, no. If those papers are signed, the patient will then be granted admission with no prepayment.

Q If you are unable to do the abortion for Mary Doe under a Hyde Amendment standard, is there any alternative for her in your community?

A My community has no funding for abortions available that I know of. I would be willing and have in some cases in the past done abortions for free, but she is a second trimester abortion. She was fairly well along

before she realized that she was pregnant. She would require hospital admission for second trimester procedure. The costs are considerable and the hospital cost in her case 250 to $300. In the New York area it would probably be about double that.

* * * *

[491] Q Then do you consider that there is a difference between the abortions that you would consider to be life endangering and abortions which are medically necessary?

A Yes.

Q And approximately what proportion of the abortions that you now perform do you think you would be [492] able to certify according to the standard you have articulated as life endangering?

A I heard the figure before of less than 1 percent. Now, from what I have said before, you could gather that my own interpretation would probably put it in the range of five to ten percent. In other words, there is a significant number of poor women in the Medicaid category who I feel that would, because their health needs are greater because their level of nutrition is worse, their levels of anemia, essentially the conditions that bring them to us, and the steps to which they are likely fall if a pregnancy were to continue, that threat is so great that they are much more likely and a much greater risk. So if I were persuasive enough, I hope that I could obtain abortions for five to ten percent, but eighty to ninety percent would be turned away.

* * * *

[493] Q If the standard of life endangering applied by the State was imminent risk of death in pregnancy or childbirth, then what proportion of patients do you think you could certify?

A I would say less than one tenth of one percent. I have done—I have seen thousands of pregnant patients, delivered hundreds and hundreds of babies, and unfortunately have to participate in many hundreds also of abortion procedures. Of these, there is not person that I would have sat down and said to that patient, you will die

if you do not have an abortion. I don't—these patients are very, very rare.

The ones that I have seen that might have been in that category were already in a coma so we didn't have to sit down and talk with them. We had to do everything we could do just bring them back, so that it is a very small number.

* * * *

[Dr. Judith Belsky:]

[3547] Q Dr. Belsky, could you give us your general observations about the mental state of those persons that you interviewed in 1969 and 1970?

A A very large proportion of them were fairly depressed and agitated and sometimes panicky. Many of them were having nightmares, some of them were feeling unreal or depersonalized. Some of them were becoming very disorganized and some were actually psychotic. Some of the [3548] patients were ruminating about suicide, some had made atempts during their pregnancy, some of the patients had already tried to abort themselves or had gone to somebody else in an attempt to interrupt the pregnancy and some of the patients were also so destroyed and so unable to control themselves that they were in some cases abusing and neglecting their children.

* * * *

[3622] Q Yes, on women who had not previously been diagnosed or treated for psychiatric illnesses?

A There again it is a stressful situation and how much stress there is depends on I think to some extent the availability of abortion.

I think that at the present time I do not see as much stress in the patients as I did when we had a very restrictive abortion law.

Q Do you feel that the population of women that you see are more likely to develop mental illnesses under stress than the population at large, or than the middle class population?

A In some respects I do.

I think that poor people in some ways are subject to so much stress in areas that middle class people just don't experience stress or just take for granted things that

they have and don't appreciate how wearing it can be. For example, if you are on Welfare and your Welfare check doesn't come or the mailbox in your building has been broken [3623] and your check is stolen and you have got to go to the Welfare Department and stand on line and maybe you don't see your Welfare worker that day, well, that is very frustrating and stressful, especially when the Welfare people don't care whether you do or you don't get your money.

I have patients who live under horrible conditions in terms of housing—

Q What do you mean horrible conditions?

A Well, living in very dilapidated buildings where they have ceilings crumbling, where they don't have heat, where there are rats and the rats get into an open package of food.

I have one patient who is terribly distraught, and this is not a psychiatric woman, she is a woman who has an anxiety neurosis, but she has become very very agitated over the fact that—well, people whose husbands have lost jobs, they have to move to a very dilapidated building and there are rats in the apartment and no matter how clean she keeps the apartment every morning she finds rat feces on the stove. The refrigerator is too small to put everything in and she has a five year old son who won't sleep anymore by himself, he is very frightened by the rats and he is agitated.

I think this is the kind of thing that poor families have to deal with every day which is very stressful.

[3624] I also think poor families tend to live in areas with very high crime rates, and I know my patients talk about their bad experiences. For example, women who live in a building which, let us say, is on some street on the lower East Side or in East Village where a very large number of drug addicts congregate and where there is a very high crime rate, these women are very frightened just to walk down the street during the day. Sometimes the locks on the front door are broken so that there are addicts and other people who may asault them, hanging around in the lobbies of the building.

A number of my patients have been attacked in their buildings and I think it is stressful to any woman who has been assaulted or raped, or even if the rape has not been completed, it is just the thought and the fact that it was attempted which is very disruptive.

I think it is the combination of all of these factors and a kind of hopelessness that goes along with it that makes the patients I see at Bellevue more vulnerable to break down under stress because the unwanted pregnancy is one more stress added to a lot of other stresses and they don't have the same kind of help available that middle class people have.

For example, if a poor woman has not got any [3625] close family and has a child and she has difficulty coping with the child, it is hard for her to get anybody to help her out, but if a middle class woman has difficulty coping with a child, and I have had private patients who have emotional problems which makes it hard for them to cope with a child, but they usually have the money to hire somebody like a housekeeper or nursery schools are more available because they can pay for them.

I think, too, that money makes a difference between middle class people who have the option and usually if they really want to abort their pregnancy, they can get a safe abortion either legally in another country or a safer legal abortion here done by a doctor rather than by somebody without any medical training.

I could see sometimes a difference between the private patients I evaluated for abortion and those in Bellevue, my Bellevue patients that I evaluate for abortion. The private patients weren't really as desperate because they knew they had these other options.

* * * *

[3628] A The next article is, "Children Born to Women Denied Abortions." This is the first author's name is Pytrych. This is a Czecholovakian study. They studied 220 women who were denied approval for abortions and they compared them with a control group of 229 women who were matched for various factors like economic data and married data—

THE COURT: What was the controlled group, did they also have children?

THE WITNESS: Yes.

THE COURT: These are two child bearing groups, one unwilling and the other presumably willing—

THE WITNESS: The controlled group didn't request abortion, but they were of the same age and had the same social condition. They found that the children who were born of the women denied abortions tended to have a higher incidence of illness and hospitalization, to have poorer school performance despite the same level of intelligence as a control group, and they had somewhat worse integration with [3629] their pier group. The authors felt that these examination of these children which was done at the age of nine were suggestive of a potential for future maladjustment in these children and they pointed out in their study they excluded women who placed their babies in foster care or for adoption. They didn't study those children who were in foster homes who might have a higher incidence of disturbance.

Q The group study was only the group of women who kept the children with them after being denied abortions?

A Right.

Q Yes?

A The next study is a British study by Pare & Raven. The title is, "Follow-up of Patients Referred for Termination of Pregnancy." These authors studied 321 patients who had been considered for abortion and they found that abortion—

Q Considered for abortion, you mean before an abortion committee?

A Yes. Under the British rule. They found first of all, in those who did have abortion, there was relatively little psychic disturbance following the abortion. They found that among the group who had been denied abortions and who went on to continue the pregnancy, that some of these [3630] parents showed some very serious psychic problems and some had to be hospitalized. They commented if they could have reconsidered they would have recommended that some of these patients have abortions. They also found about ⅓ of the mothers who kept their babies said that they resented them.

Another finding of theirs was of somewhat similar to mine, of 120 patients whose request for abortion was not approved—36 percent got abortions elsewhere.

MR. RUDOFSKY: I couldn't hear that.

THE COURT: 36 percent of those who are refused abortions obtained abortions elsewhere.

Q That was Plaintiff's Exhibit 162?

THE COURT: It was.

MS. BENSHOOF: Yes.

A The next study was a Swedish study. This was a follow-up study of 120 children born after application for therapeutic abortion was refused. These children were studied at age 21 or up to age 21.

THE COURT: You mean they were followed until 21?

THE WITNESS: In other words, they picked for those children—children born between 1939 and 1941. They had a control group where they took the next same sex child born in the same hospital after the [3631] child born to the woman who had been denied an abortion. They found that on certain measures there were significant differences between the study group and the control. This was true in terms of the instability of the homes, either in terms of divorce or that they were out of wedlock children or that the children—there were complaints of neglect or abuse of the child.

They also found a significant increase in psychiatric problems—

THE COURT: In the children?

THE WITNESS: —in the study group, the group of children that had been unwanted as compared with the control group. They found a significantly greater amount of delinquency in the study group as compared to the controlled group and they also found a higher proportion of these study groups to be receiving public assistance.

Another measure which they found a significant—statistically significant difference was that the study group children had less higher education when you allowed for factors like social class and intelligence, even when you just compared a study of the controlled chil-

dren of the same social class, they still had [3632] less education.

The next study was a Norwegian study from the University of Oslo. This was a study of mental disorders following pregnancy in manic depressive women. Essentially, this study shows that there was an increased incidence of serious depressions in this group of women following delivery.

The number of depressions were much higher than would normally would have been. In their summary, they state it occurred in 37.8 percent of the 82 women—

THE COURT: Excuse me.

THE WITNESS: Postpartum mental disturbances occurred in 31 or 37.8 percent—or 37.8 percent—

THE COURT: I can't connect the next syllable.

MS. BENSHOOF: Out of the 38 women, 31 women had the postpartum depression.

Q What was the conclusion of the study as far as relationship of child birth and—

A They concluded that child birth represented a stressful factor for these women that contributed to their breakdown.

* * * *

[3633] Q Dr. Belsky, have you ever treated a patient having children dying for a genetic disorder?

A Yes.

Q Could you describe your experience in that area?

A This was what one woman who come to the prenatal clinic pregnant and I was asked to see her because the gynecologist recommended an abortion on the grounds, first of all, she had two children who died of a rare genetic disorder called Lieber syndrome.

According to the hospital chart, this woman was schizophrenic and made a suicide attempt and admitted to Bellevue's Psychiatric Hospital. I evaluated her and she wasn't schizophrenic—

THE COURT: What was that?

THE WITNESS: She was not schizophrenic, but she was very depressed. She wanted very much to have a normal child. She described her experience with these two children. Lieber syndrome is a severe [3634] dis-

order of the central nervous system and her babies were both blind and severely retarded, unable to recognize another human being, unable to sit up, talk or walk. One of them lived to be four and one lived to be two and a half and essentially they were vegetables. There was no meaningful existence, really, for these children or any meaningful relationship with anybody else.

I think the only reason they lived was because her devoted care. They eventually died of pneumonia. She had been very depressed when she would take care of these children and she made the suicide attempt following the death of one of the children when her husband and her family—husband's family blamed her for the disease and the death of the child.

She told me that she had been divorced by her husband. This current pregnancy was by her boyfriend. She didn't know whether this child would develop the—

THE COURT: There would be about a 50 percent chance?

THE WITNESS: —and the gynecologist didn't know either and we had her see the geneticist in the Department of Medicine and he reviewed the autopsy reports and the slides of the two babies and he told [3635] the patient that there was no test that could be done to detect the syndrome. It is a very poorly understood—

Q Amniocentisis could not be done for this disease?

A They could not be able to tell. All he could do for her was calculate the statistical risk that this child would be effected and he calculated—it was a little complicated because the boyfriend was a second cousin which increased her risk. So her risk was like 12 percent or one in 12. Should she elect to take that chance and to have the baby, and fortunately, the baby was normal, but I treated her for a number of years after that because first of all, she was chronically very depressed in large part because of her experiences with these very defective children and her feeling that it was some how her fault and it was something bad in her that had caused this to happen.

Also, she had difficulty with her normal child because she was constantly afraid that this child was going to

develop signs of Lieber syndrome and she was afraid to be attached to the child, for she was afraid she would lose him and she would overreact if he would spit up while feeding which is normal, but she had trouble differentiating that.

Q What would you think would be the effect of [3636] denial of the abortion option in these cases, in cases where women have potentially defective fetuses and those defects can be diagnosed through amniocentisis?

A I think if a woman wants an abortion—if she knows she is carrying a defective child and the abortion is denied her, I would expect a serious psychiatric problem during the pregnancy and even afterwards when the child is born.

Q Do you feel women who have such children can have or do have severe and long lasting mental damage?

A Yes, I think some of them do.

Q Doctor, what is your experience with the mental effects of women who have obtained an abortion as opposed to those women who have carried unwanted pregnancies to term and give up children for adoption?

A I did try some follow-up, some of the patients that I was seeing for therapeutic abortions in the beginning before they got to be patients and I found that patients usually were relieved after the abortion and their psychotic symptoms abated. Even some patients who had been psychotic seemed to reorganize rather quickly even if this they [sic] hadn't any chronic problem. With patients who were chronically psychotic, the abortions did not cure their schizophrenia. I didn't find any real pathological effect. Some patients [3637] told me—this is not my observation as it was reported to me—that they had given children up in the past for adoption and that they have never gotten over a sense of loss—

Q These are the same patients who later had abortions?

A There were some patients who had both given up the baby for adoption and had an abortion. They said giving up the baby for adoption was much worse. Whatever guilt they found—that they had about the abortion they got over, but that they never could get over the sense of loss of the child that they had given away and they also wondered where the child was.

Q And you treated these women who had given up children for adoption?

A These were patients that I interviewed during the time that I was evaluating patients for abortion.

* * * *

[Dr. Jane Hodgson:]

[37] Q Were you ever questioned in your judgment of an abortion you performed during that period under the standard to save the life of the mother?

A Yes. I can think of one in which I received a lot of criticism.

That was a woman who had cancer of the breast and radiation therapy and her prognosis for survival for five years was about 50 percent.

She was the mother of three boys and was trying to adjust her shortened life expectancy and trying to lead a happy life and when she could not use oral contraception because of the danger of the pills accelerating her disease she was using a diaphragm for contraception and experienced failure and came to me with a pregnancy which she wanted to interrupt because she did not expect she would live to raise her children and I felt her wishes should be respected [38] in this regard and performed an abortion and was openly criticized for this. So, there was no real standard of medical indications at this time.

Q During this period did you have occasion to treat women who resorted to self-abortions or obtained criminal abortions?

A I saw a great many of these. I think being the only woman gynecologist in St. Paul, I had more than my share, particularly the young teenagers, the students who would come to me with problem pregnancies. I was unable to help them. I knew what would happen. I advised them against illegal abortions but I knew full well they would be back to see me after their illegal abortion

and were bleeding and possibly sterilized for future pregnancies.

Q Did you treat many of these patients at that time?

A Very many, yes.

Much too frequently.

Q Could you explain some of the medical indications that occurred from self-abortive techniques.

A Largely pelvic infection, septicemia, severe infection with actual death or high possibility.

There were annually, several deaths in this country from criminal abortion and our wards at St. Paul Ramsey [39] were filled with patients suffering pelvic infection, secondary infection. Now we don't have that. It has been a miracle since 1973.

Q When you treated these patients who had criminal abortions did any of these result in permanent health problems?

A Oh, yes. Some of them were made obstetrical cripples. They would be permanently sterilized due to the severity of the infection.

Q Were you ever prosecuted under the standard to save the life of the mother in Minnesota before 1973?

A Yes.

I challenged the Minnesota Abortion Law in 1970.

Q Could you explain the circumstances of that challenge?

A A woman that had had definite evidence of Rubella in the third week of her pregnancy came to see me wanting an abortion because of the danger of congenital defect.

I went to the District Court and asked for an injunction to prevent my being prosecuted and for permission to perform this abortion. This was not granted to me and because of the time element I went ahead and performed the abortion and informed the Court and was indicted and convicted, and

* * * *

[43] Q Dr. Hodgson, have you examined the language of the Hyde Amendment?

A I have.

Q Is there a standard medical definition of the phrase, when the life of the mother would be endangered if the fetus were carried to term?

A That is a very ambiguous statement. It actually means very little to me.

If you take it in the strip sense of the word, there would be no such cases essentially because in this day of modern medicine it is possible to get almost any woman through a pregnancy as far as her actual physical life is concerned.

[44] However, if you are simply talking about endangering her life then it is a matter of degree and what are you talking about—her physical life, mental, emotional, social life? There are [m]any (sic) degrees of interpretation that are possible.

Q So, your answer is there is no standard?

A Absolutely none.

Q Have you recently examined any patients and had to confront the language of the Hyde Amendment?

A Every day.

Q Before the temporary restraining order was entered by this Court last week, did you have occasion to have to try to interpret this language?

A Yes. I think you have the affidavit of one of my patients that I saw last Friday who was a mother of four, a 24 year old woman who had delivered last November and she—during which time she developed a severe case of phlebitis which required a long hospitalization.

She had not recovered from the phlebitis and again appeared pregnant and was asking for an interruption of her pregnancy.

The phlebitis itself is an extremely serious complication of pregnancy because of the great danger of blood clots to the lungs and the problem of treating it [45] during pregnancy is that the drugs that are used that prevent blood clots are very dangerous to the fetus, so if the pregnancy continues you simply cannot treat the phlebitis. That is an example of the type of problem we run in to. Does this actually endanger her life? At the moment she is not really in any great danger but prob-

ably would be. How soon or how much does one's life have to be shortened?

* * * *

[50] Q The Hyde Amendment, if it were implemented, would you be forced to refuse to do abortions on women with medical problems and whose abortions you feel are medically necessary?

A I wouldn't be allowed to admit them to the hospital so I would be unable to take care of them, right.

Q Could you give us some examples of health threatening problems that you feel you would have to refuse to do abortions on these individuals?

A Well, I am particularly concerned about the very young patients.

We have a large number that are in their early teens. These youngsters that are under 15, I am talking about.

These, of course, while their life is endangered inasmuch as the risks are so much higher for the young teenager for carrying a pregnancy to term, I doubt if there would be allowed, or this would be allowed under the Hyde Amendment; so these girls are often the ones that are Medicaid patients.

I am concerned about the IUD patients, the number of IUD failures.

[51] We noted in Washington where we had such vast numbers of patients that at least three percent of our patients had IUD's in place, there were IUD failures.

Another recent spotcheck in Minnesota revealed that seven percent incidents of IUD failures in the abortion applicants was the case and it has been publicized a great deal that the risk of IUD's in pregnancy and the danger of infection and the FDA has urged all women to be alerted as to the risks.

What will happen to this type of case, under the Hyde Amendment is not mentioned in the conference report.

Q You stated that the FDA, you mean the Federal Drug Administration has alerted women as to the dangers of IUD?

Does the FDA recommend to doctors that they suggest abortions?

A It has been so suggested.

Q By the FDA?

A Yes.

Q What would you do if a Medicaid patient has an IUD failure?

A I don't know.

* * * *

[67] Q Let us say death during the course of the pregnancy to at or about the time of delivery. In other words—well, all right, let us take one part at a time, during the course of the pregnancy, which ones bring to your mind that possibility?

A Well, IUD in Utero, and it has been pointed out that a woman that conceives with an IUD in Utero runs a high risk of serious infection during the second trimester, and there are a number of cases that have been reported, of 75 or 100 I think at least, of death to the woman during this second trimester because of overwhelming septic infection.

[68] Q Let me stop you there.

Is that the kind of condition that you can monitor?

A No, you can't monitor it. I have delivered any number of women at term with their IUD's and they never turned a hair or ever had any problem.

Q Can you determine at the outset whether a woman has an IUD in Utero?

A Yes, you can.

Q Is that something you can watch as time goes on?

A You can't tell which ones are going to get infected, you have no way of knowing that.

Q Can you tell when they become infected?

A Once they are infected it is too late, it is an overwhelming thing that occurs in 48 hours in some of them.

Q What others?

A It is like lightning.

Q What others?

A What others?

Well, a woman with a severe hypertension, for instance, could have a stroke.

You don't know.

* * * *

[Dr. Christopher Tietze:]

[957] Q Do you have reason to expect that the rate of complications or death from illegal abortions in this country would be higher with the implimentation of the Hyde amendment than under the old criminal abortion statutes?

A I would expect that the number of deaths due to illegal or criminal abortion would be greater. Now, the abortion that the death rate—the death case rate would be lower because back in the early 1960s a very large proportion of illegal abortions were performed by physicians, including some very experienced and very careful practitioners and probably the mortality associated with these abortions was quite low and of course there were (they) also cases—probably a minority of cases—aborted by self-aborted or aborted by unskilled practitioners with a very much higher mortality.

Now, if the Hyde amendment forces some women into illegal abortions, the mortality of—for these women who have the illegal abortion would be very much higher—would probably be substantially higher than illegal—than mortality of illegal abortions was in the [958] 1960s, because all of these abortions would be performed—done by the woman herself or by unskilled people.

If she had the money to pay a doctor she could get a legal abortion. She wouldn't get any illegal abortion. The whole character of illegal abortions in '78 would be quite different or in 1976 is different from the character of illegal abortions under the old law when some doctors were involved.

THE COURT: Were there any statistics in the pre-1970 period on deaths which were attributed to complications rising out of abortions?

* * * *

THE WITNESS: You will find a similar table in the fact book, I think it's Exhibit 8, back on Page 62 and the graph on 63 but I have carried it for another couple of years since then. I will [959] go through these statistics.

These are the total number of deaths associated with

abortions by the type of abortions. I am using the term abortions or abortion-related on purpose.

It's not the same as attributed. It's a broader term. There are some women that die in connection with abortion. A woman with a severe heart condition who undergoes abortion but dies soon thereafter, she dies of heart disease.

Or another woman might die of cancer. Such cases would not be attributed to abortion in ordinary statistics but they are included here.

They are included in these statistics. Around 1960 we had on the average about 300 deaths attributed to all types of abortions. Of those only a handful, five, were attributed—were associated with legal abortions, because there were very few legal abortions at that time.

The rest were due either—were associated either with illegal or spontaneous abortion. We cannot make this distinction until 1968.

If you look at the statistics—at the first column, going from 1960 to 1969, you can compute an [960] average annual decline in the number of deaths on the order of seven percent per year.

Now, illegal abortions in 1969 were on the—the deaths—were on the order of about 100 and they have declined very, very rapidly and about 40 percent per year and in 1975 the CDC identified only five cases.

Actually they identified only four cases but they had one case that they couldn't decide whether it was illegal or spontaneous or whatever, so I also try to set my statistics against what I would like to see, bending over backwards as it were, so I included the illegal death here. That's a decline of about 40 percent per year.

Now, at the same time you see an increase in the deaths associated with legal abortion. You see a quite high figure in 1970 and 1971, when doctors were learning how to do these things and then it has settled down to about 26 per year, although the number of legal abortions has continued to increase.

But even if you include all abortions, legal and illegal, and spontaneous, you will find an annual decline, I think, of about 23 percent per year from 1969 to 1975.

[961] Q Now, from knowing the number of deaths—

THE WITNESS: Does it answer your question, your Honor?

Q From knowing the number of deaths from the legal abortions can you predict the number of complications?

A Well, according to the JPAS study and new data from the JPAS CDC study, I would say major complications run to 100 times the number of deaths and total complication ten times the number of major complications.

If a person dies that's a fact, you can argue for the proper attribution of the death. To define a complication and to define major complication is also subject to argument. These softer figures are the figures of death.

Q Can you also predict from the number of deaths the total number of legal abortions performed?

A That's very difficult because we really never had —we have the numerator, even some questions about the numerator—that's the number of deaths. We never had a good denominator. There has been a statement widely quoted of a million illegal abortions in the United States in the early 1960s, the number was probably smaller in 1969 because of more contraception.

Then you have this factor that the mortality [962] of illegal abortions probably—the mortality of illegal abortions probably has increased because the group becomes more and more limited to the self-abortion than to the butchers.

All I can say, because of the last factor the decline in the number of illegal abortions probably has been greater, percentagewise, than the decline in the number of deaths, because the thing has become more dangerous.

Q Can you explain or describe some of the complications from illegal abortions that you would characterize as major?

A To be fair you would have to provide the same criteria to legal or illegal. In the JPAS study we defined the major complications as follows: We had three categories that accounted for 90 percent of all cases. We included every case of unplanned major surgery, would it be laparotomy, opening of the belly, and repairment.

It would include a hysterectomy, a removal of the womb because of uncontrollable bleeding, and any operation necessary for injury to other organs such as the intestines.

Secondly, we include any case of, I think with two or three days of fever more than 38 degrees C., and [963] any blood loss of more than 500 milliliters, I would have to check that figure, and then these three causes, major surgery—major hemorrhage and major infection would account for 90 percent of all the cases that we had classified as major complications.

Then there was a mixed bag of other diagnoses which, with the advice of gynecologists, we decided were equally serious.

I would of course apply the same criteria to illegal abortions and the number of professional abortions, but it would be rarer with the spontaneous abortions than with the legal and would be more frequent with the number of illegal abortions.

* * * *

[975] Q Dr. Tietze, are you familiar with work that has been done involving Irving Siefer defect or diseases in the fetus during pregnacies?

A In a general way.

Q Could you describe some of the conditions that can be discovered through this method and what point [976] in pregnacies they can be discovered?

A In general—the conditions are of various kinds. Many of them are chromosomal abnormalities. As you know, the human body, the body of all other living creatures is made up of cells. The cell has a nucleus and within the nucleus, you have a certain number of chromosomes, actually 48 in the human. Anomalies of these certain major physical abnormalities are associated with abnormalities in the structure of the chromosomes.

The fetus, also, has its own set or its own set of chromosomes and they are in all its cells, including the cells on the body surface, on the skin, which are sloffed into the amniotic fluid in which the fetus swims and you can withdraw a certain amount of this fluid and centrifuge it and have a look at the cells, cultivate the cells, let them grow and if you examine them under the microscope you also can consider for other diseases, you can

do other certain chemical examinations; however, the procedure by which you draw the fluid which is called amniocentesis cannot easily be done before 16 weeks of pregnancies.

Q So it can't be ascertained until the second trimester of pregnancies?

A Well, into the second trimester.

[977] Q Could you describe several of the conditions that are discovered?

A The one which I think is the most dramatic one in this case is the disability known as the Taysachs disease. These are the names of the two physicians identified with the description. It is also known as Amaurotic Idiocy. The peculiarity of this condition is the following: It is almost entirely limited to a very well defined population group; namely Ashkenazi Jews, Jews of eastern European origin. Among this group of people, about one person in thirty is a carrier of the disease which means that he or she has the genes for this particular abnormality in one half of his or her chromosomes.

When you have a mating, marital or otherwise, of two carriers, one fourth of the children would suffer from this condition. The important thing about—since one person out of thirty is a carrier, about one mating in 900 among Ashkenazi Jews in the United States would be a carrier mating and would have one chance in four to produce a child suffering from this terrible condition.

The important thing is that you can identify the carriers by a simple blood test. If you find a carrier mating you can then perform amniocentesis and identify the fetus with a double set, in effect, of [978] chromosomes.

In other words, the fetus that will eventually develop, suffering from Taysachs disease with virtually 100 per cent certainty. This is a terrible condition. The children are born normal. In fact it is said that they are particularly beautiful children and they seem to develop quite normally, but at six or nine months, things change.

They may have learned to sit up at that time. They may be able to stand but at that time the mother will notice changes in the child's behavior. He can't sit any-

more; he can't sit up. He's slacking, he's paralyzed. That's the same time the child ceases to react to certain stimuli. But 12 to 18 months the child is blind as well completely paralyzed, but he usually continues to live for another few years.

They are all dead by five years of age and preceding that they have to go through a period where they require the most intensive care.

[979] DIRECT EXAMINATION

BY MS. COPELON: (Continued)

A (Continuing) They can't—they have to be tube fed because they can't swallow. Secretions accumulate in their lungs and bronchial passages which have to be aspirated all the time. They have to be turned around in their cribs because they get bed sores. Eventually, they go on to have convulsions which may come as often as every hour. It's an enormous problem, financial and emotional problem for the parents as well as, I would say, a most miserable way of dying for the child. It is something that a skillful community organization, bringing all the young adults of child-bearing age to have the simple screening test and then following up for those who want to, by testing of the pregnancies, can, again, be eliminated in about 100 percent certainty without having to wait for the first defective child to be born.

There are other conditions of this type where you cannot identify the carriers and where you have to wait until the defective child is born, and then you can check future pregnancies if the parents have the fortitude to undertake an additional pregnancy, but with Taysachs, you can prevent it from the very beginning.

Q Do you think that this condition would qualify [980] under the Hyde Amendment standard for reimbursement as one which makes abortion necessary in order to prevent endangerment to the pregnant woman's life?

A That would again depend upon the interpretation of the physician. There are some physicians who, philo-

sophical or otherwise, reject abortions altogether, and they would feel even the suffering to the child and the parental anguish to the mother of that child does not cause a demonstratable illness. On the other hand, there are many physicians who would feel that the degree of stress imposed on the parents of such a child, particularly in the first instance of the mother of such a child, is so great that this is absolutely a situation of medical necessity.

Q Of medical necessity?

A That's right.

Q Do you think it would qualify as a situation of life endangerment to the mother?

A That would depend upon the interpretation by the physician and it should come to a determination by the department perhaps of the opinion of officers of the department. I have no knowledge how they would decide.

[981] Q Under the old life-saving standard, under the criminal statute, it is true that abortions were performed for women that had German measles?

A Yes. I would say something on the order of 4,000, perhaps, in 197— Excuse me, in 1964 and perhaps another thousand in '65, because physicians had come to the conclusion that this was the kind of emotional stress they could not expect a woman to take upon herself and therefore they did perform these abortions although they were not permitted under the wording of the law in any state.

So I would assume that many—there are fortunately not as many pregnancies affected by Tay-Sachs in the United States as there were in '64 affected by the German measles epidemic, but I would expect many physicians would take the view that this was a case of medical necessity.

I think the patients wanted to have the determination made, and the abortion performed. I think many physicians would agree and take chances of not being paid or being sued for fraud.

Q Doctor, are there other conditions that can be identified through amniocentesis?

A Yes. The most common one is what used to [982] be called mongoloid idiocy, but in today's days we don't use the term any more and call it the Down's Syndrome, or g. trisomy, because the chromosome is affected.

There are three chromosomes there instead of two. That is a condition that is not hereditary as far as we know, but it is a chromosome that tends to develop in women when they get older, at the end of the child-bearing period, and is quite high for women over thirty-five, and decreases with advancing age, so that I think it has been proposed, and I agree with the proposal, but women above thirty-five and certainly pregnant women above forty, should be screened for by amniocentesis if they consider abortion in order to identify the Down's syndrome fetus and then not permit it to be born.

Incidence for these women is about one in forty.

Q Are there a number of other conditions that are much less frequent?

A There are a number of chromosomal conditions, about sixty, according to the geneticists. A number are quite rare. Not all of them have been identified in a fetus, but they could be identified in a fetus.

* * * *

[Dr. Adele Hoffman:]

[1336] Q Is there a standard medical definition or do you understand what the phrase means, when the life of the mother would be endangered if the fetus were carried to term?

A I do not understand what it means. And it is not a common phrase in the medical parlance. It's extremely vague. I would have a great deal of difficulty if I were asked to write guidelines in terms of how to implement this.

Life endangerment can mean anything in terms of what you define life as. In my judgment, you can define life as something extremely ordinarily in terms of breathing. Does this mean, then, that I can't do anything if it were to render the patient comatose, but that I could maintain them on a respirator? Do I have to use

the Harvard criteria of death which is basically—which is basically indicated by the presence of brain activity, by electroencephalograms, and according to the Harvard criteria, promulgated primarily in instance of comatose individuals when they have died [1337] because we can't support life by a respirator, by cardiogram pacemaker, by renal dialysis, and that the former criteria of life which used to be established as to whether the heart was beating and the patient was breathing are no longer valid criteria of life.

Does this mean, then, that life is solely that if I can only perform an abortion under those circumstances in which brain wave activity would be terminated if the pregnancy were continued. I would find that would be the strictest and the narrowest definition of life endangerment. This is not a definition that I as a physician could possibly operate on. I cannot operate in a situation where I have to study and measure risk solely on brain activity.

Let's go on—take it one step which might be seen as pretty extreme, but I will bring it in, as to whether a person's life is going to continue, life [like] (sic) breathing. And I think the Joann Quinlan case was the extreme of consent and suppliant life that life was being able to think rationally, one was able to exercise one's own judgment within that life. Is that what we are talking about?

If you are, then one has to also begin to look, does life mean that the individual is crippled, is maimed, but is able to think? Well, what about their physical status? Does it mean that a young woman who may have to have a [1338] Caesarian section—and we will get into this a little more later—because she is so young as a teenager and the baby at term is large, does this mean that the increased probability of having to have a Caesarian section, that that has anything to do with life? Because each subsequent operation increases the risk to her life. There are so many areas.

Q Are you saying that one interpretation can be more broad than the very narrowness and would involve a risk calculation or increase a risk calculation?

A Yes. I think a physician always operates on [the premise] (sic) that he can't predict these things. We are getting into predictability. I operate on a combination of the risk benefit ratio of anything that I would recommend to a patient being medically indicated or medically necessary and the probabilities of the risk of not having that form of treatment. I can only operate on that aspect benefit risk ratio and probability of things happening. There is no way we can gaze into a crystal ball. One has been surprised by the number of patients that haven't gone along predictable paths where you think everything is going to be fine and then they get into trouble or vice versa. So that I really can't—in terms of deciding about endangerment of life, I can't make that anticipatory decision really even if I knew what it meant.

[1339] Q Doctor, I would like to call your attention to the phrase in the Hyde Amendment, would be an endangerment, which is, of course, a future tense. Do you feel that this phrase, would be if the fetus is carried to term—that is, the future—that that increases the burden on the doctor in anticipating risk because it is a future tense?

A Well, of course, there are always—if you're working on probabilities, it would be implying the future. At least, the burden of proof in essence is up to the physician. I think it's one of the great problems in all of health care in which one has to come to expect good results uniformly and that issues of negligence and risk are not really so considered as just expectancies of good results regardless of what this is. Let me take another example that illustrates the kind of difficulty that I have about this terminology which is so totally different from the area of pregnancy and abortion.

Let's say I see a child in the emergency room with a strep throat or a sore throat. This might be due to the strep organism. Let me say I guess it is. If I treat that patient with penicillin, I will probably cure that strep throat. But if I don't treat him he will probably get better and get over it anyway over a period of time. The risk, the probabilities are that he will get

better. Let's [1340] say that I don't treat it and he does get better. He is now a greater risk of developing an immune disease of rheumatic fever.

Q Do you mean even if this child gets better there is that risk?

A If I had not treated him with penicillin, the bacteria would stay in his system and this would be called an immunize condition in which he becomes—his heart muscles react against this toxin that is in his body and he will develop rheumatic fever. Let's say I don't treat the rheumatic fever and let's say it's an adolescent. Because the older person is less likely that they would have this condition. He probably will recover from that. But the probabilities are that he will have persistent heart damage and that his life may be curtailed at 20 years.

In drawing the parallel—and the reason I want to bring this kind of a situation up is because it's very clear and it does have the issue that we are talking about. I have three points in the treatment. At least each point I may treat without there being a serious risk immediately of life endangerment, but that it has a series of consequences which will ultimately bear a real potential, but not a guaranteed likelihood of life curtailment in the long range. And even if he gets a heart disease and he's 40, [1341] and he has heart failure because it's an inflammation of the valve, I might even be able to operate and replace the valve or I might be able to place him on Digitalis and give his heart muscle greater strength by virtue of the effects of that drug. So I just have to state that there are many alternatives. I would think I would be medically remiss not to effect treatment at the earliest potential in that child and that I would be viewed by my medical peers as negligent if I did not treat that minor preventively in the first place by giving him penicillin when he first came in with that strep throat.

Q Thank you. Doctor Hoffman, I would like to read you a definition of whether an abortion is medically necessary by the Supreme Court.

Whether an abortion is necessary is a professional

judgment that may be exercised in light of all factors: physical, emotional, psychological, familiar and the woman's age-relevant to the wellbeing of the patient.

Doctor Hoffman, do you agree with this criteria for defining a medically necessary abortion?

A I have read that statement before and I would agree 100 per cent with it. It would express much more succinctly how I would describe it. Yes.

I would also, if I might, say I would find a [1342] great deal of difficulty not equating medical necessity with that which I would have to carry out in order to avoid life endangerment because I would consider these two situations—for myself I would have to because I could not manage the patient's responsibility otherwise as almost synonymous.

Q Do you feel that under the medical standards or the standard—do you feel that under the standard set up in the Hyde Amendment that medically necessary abortions will not be covered?

A I would like to say I know that they won't be. I really can only conjecture. I certainly believe that it will pose serious profound strictures on the availability of abortions to Medicaid eligible adolescents.

Q Doctor Hoffman, do you consider all abortions medically necessary?

A I consider all abortions medically necessary in adolescents because of the very significant increase in biological and psychological risks to the teenager. It is difficult for me to conceive that our medically biological or sociological 14 or 15 year old is ready to bear a child, or is ready for parenthood or for any other aspect of childbearing and child rearing.

Q Doctor Hoffman, based on your experience at Bellevue and your related experience in various other [1343] hospitals that you said you consulted with, do you feel that if word goes out to teenagers that abortions are only available to them under Medicaid, if there is a life-saving standard or life endangering standard that they will come in to even seek a doctor's care or advice for a suspected pregnancy?

A Any impediment to the access to health care has been regularly shown to decrease the number of young people coming for help regardless of what it is. Young people have a terrible time with simply all kinds of institutional rules, regulations and registration. We have enough difficulty getting them in for routine health care much less care that is going to be associated with various issues such as who pays, the kinds of social sanctions that may be weighed upon them, the problems this raises in relation to a whole host of issues in their future choices. I believe any impairment, and particularly an impairment about having the economic factor enter into it will serve as a very profound barrier to young people coming to health care in this area.

* * * *

[1348] Q Is there anything with the teenage endocrine system or you know, physiological system of a young teenager that would make them predisposed to catching or developing toxemia?

[1349] A It could be. I don't think we really know the effect upon the growing individual of these—because it really is a relatively recent phenomenon that young people under 15 are having as many children that we can begin to look at statistics. We do know that in animal studies, that early pregnacies can cause stunting and runting. That is in rats, if pregnancies are induced at the time of first ovulation that the rats will not complete their growth.

We know that adolescents still—girls have still about two years to grow after their first menstrual period, but that they are capable in many instances of becoming pregnant at the time of the first menstrual period.

There is a common belief that adolescents don't ovulate early in their menarche of life. While this is true for a goodly percentage it is not true for certain selected youngsters. We have seen quite a few, obviously attested to by the growing increased number of kids who are pregnant under 15.

I would feel that young people who are two years—still within a two-year period after first menstrual period,

still are growing—they still are in their puberty growth spurt, still amassing bone, muscle, expanding their blood volume, need iron for their expanding blood, red blood cells and so on.

[1350] Pregnancy at this time—there are very major obvious endocrine changes going on at this time with all of the development issues in terms of going from non-reproductive to a productive individual. So I would say that there is a real likelihood of increased predisposition to all of these conditions as a basis—based solely on lack of maturation and I do define this specifically for the young person who still is two-years—within two years of menarche usually about 15 is the mean age of menarche—is about the age of twelve and a half in this country today.

* * * *

Q You spoke of animal studies when animals become pregnant after the first ovulation. Based on those studies would it be your opinion that there is some likelihood or there is a likelihood that a pregnancy on a young adolescent may affect her future physical growth, notwithstanding the fact that she does not develop complications or excluding the fact that she may develop complications?

A It would be my opinion that it could very well—it would be my opinion that her growth could very well be impeded by a pregnancy in these early teenage years. I cannot document this from the literature because the work [1350a] has not yet been done, to my knowledge anyway.

* * * *

[1368] Q Dr. Hoffman, you have described the physiological and biological risks both to teenage—to teenagers who are pregnant as well as to infants who are born from teenagers who carry their fetuses to term. Could you now go on and describe the psychological and social problems [1369] associated with adolescent pregnancies and could you include in—any psychological and developmental stages that may be interruped by a pregnancy?

A Certainly in my own estimate, these others are very important issues, but there is perhaps nothing is

as profound as the effect upon an adolescent's life and health as having a baby in her teenage years.

I think we have found this repeatedly to be a very serious problem. First of all, I'd just like to state that—and I hope that we are agreed that there are certain functions of society in raising a child, certain expectancies of a mark of maturity and that the process of adolescence is finalizing this.

I think we view the process of adolescence as having, according to Eric Erikson, who is a recognized expert, a psychiatrist, and—psychologist and developmentalist, the tasks of adolescence is [as] being an emancipation in identity formation.

Emancipation means separating away from home and the capacity to establish a family of one's own in a mature sense and identity formation means a sense of knowing who you are and have you got it all together, and what to do with yourself as a grown-up human being.

I think we would probably all be agreed that the [1370] function of child-bearing in our country is to produce autonomous adults, adults who are capable of acting maturely, raising a family responsibly, of being economically independent and it is this process that is so important.

If an adolescent has a child at 14, 15, 16 there is absolutely no way she is going to be able to complete her development or our goals for her as a mature individual. It is very similar as if when a baby was going to learn to walk, you put a—I'm being a little facetious, if I may—you put a 20-pound weight on his head so he never learns to sit up. There's no way that baby is going to ultimately learn to sit up if he's never allowed to. And that if a person is forced into being an adult at a time when they are not emotionally or developmentally anyways near equipped to be an adult you impede the finalization of the ability to be realized.

So, I think this is my own major argument for stating that in a sense all pregnancies in adolescents are life-endangering because they endanger the fulfillment of that

maturational developmental sense and as a pediatrician is what I am committed to.

* * * *

[1377] Q Could you explain some of the emotional and mental problems that occur with adolescent women who have an unwanted pregnancy?

A Experientially one sees a host of serious emotional problems that occur, primarily depression.

The issue of depression is very profound. This is recognized by experts in the field of suicide, that there is a significant correlation with suicide in adolescents.

I can cite Joseph Techer, Professor of Psychiatry at the University of Southern California.

* * * *

A Dr. Techer is recognized as an expert in the issue of adolescent attempted suicides and this references from a chapter he wrote in a book called "Current Issues [1378] in Adolescent Psychiatry," edited by Joseph Scholar, M.D. and published in 1973.

Take either statistic specifically that a teenage romance is one of the common circumstances—I'm paraphrasing—precipitating a suicidal attempt in an adolescent and most commonly an adolescent female age 17 with an anteceding history of a disorganized family.

That of the suicide attempters engaged in serious romance, which were one-third of all suicide attempters, the suicide attempt occurred at the break-up of this romance in the terminal stages of it and of these youngsters, 22 percent roughly one in four, were all suicide attempters.

This is statistics built on statistics built on statistics, but we see and recognize the association with depression and frequent suicide attempts in girls who are pregnant.

I would not say—

Q Excuse me, Doctor. Are you referring to page 136?

A Correct.

Q The statement that 22 percent of all suicide attempting girls compared to zero percent of controlled

girls were either pregnant or believed themselves to be pregnant as a result of their romance?

* * * *

[1384] A Many of the pregnancies that I worked with in the pre-1970 era were unwanted pregnancies and one saw a great exaggeration of the basic, fundamental conflict.

I think it is fair to say that any woman, even a teenage female, has an instinctive biological relationship of a product of her own body.

If it is unwanted, what happens when they see their whole life shattered, that they have to drop out of school, because the schools are very punitive, that they're not able to perceive how they will be able to get through fulfilling their own life's dreams.

It adds a lot more in the way of hostility. Ambivalence. Depression over the rearing of the child and having to be responsible for it.

One might say "Why not have all of these youngsters adopted?"

Our social milieu is such that it almost is becoming as unacceptable to give up your child for adoption as it used to be to not do so. 95 percent of babies born to teenage women are retained within the family today.

* * * *

[1403] Q Suppose the standards under Hyde were medically necessary? This is a term you are familiar with; is that correct?

A Yes.

Q Would you feel you needed a guideline there?

A No. Because that's my skill, my art, my training. I have been practicing medicine for over 20 years. I hope that I will be able to define what is medically necessary. And, indeed, it is merely impossible to come up with a laundry list of the circumstances because each individual is [1404] different. And for any laundry list I have seen, I can up with ten exceptions. It really places constraint on the practice of medicine, with medical care which really the Government should never interfere with and has really no jurisdiction in terms of defining what

the standards of practice shall be.

Q Are you telling us that you are more comfortable with the medically necessary standards because to you medically necessary is a term of art in the medical profession?

A Art and judgment and science, and reason and rational. It allows to me the flexibility given all of the factors. And that's what really diagnosis management is. It is taking all of the factors relative to the biological, emotional, social, health, circumstances, age, developmental status, laboratory data and putting them together. It is really one of the most fantastic things about medicine and the art of it. It's a gigantic jigsaw puzzle. You can't program a gigantic jigsaw puzzle where you don't know what form they are going to take before you receive them.

[1405] Q So what you are suggesting, I take it, is that the Government should not regulate this area at all? It is incapable of Government regulation.

A I can't see how it can possibly be capable of covering all of the circumstances and the issues in general. I feel very strongly that abortions in adolescents should be—should remain medically necessary subject to the physician and the patient and that it should be stipulated no more than that.

* * * *

[Dr. Seymour Romney:]

[1053] Q Dr. Romney, the Supreme Court has defined a medically necessary abortion as follows in *Doe* v. *Bolton*:

> "A professional judgment that may be exercised in the light of all factors, physical, emotional, psychological, familial and woman's age relevant to the well-being of the patient."

[1054] Do you agree with this definition of medically necessary as pertaining to an abortion?

A I thing it is a good definition. It may not go as far as it should go, I think that medically necessary in terms of relating that to good patient care involves a

total comprehensive evaluation of a patient's circumstances which would include some insight into her cultural background and her ability to understand, initiate and carry out medical advice, medical therapy. All of those are important considerations.

Q Is medically necessary a generally accepted standard for medical care or for prescribing certain forms of medical treatment?

A It is a general standard, it need not necessarily be specifically orientated in any particular case, but in terms of a general consideration I would say yes.

* * * *

[1058] Q Can you give us any examples or potential or possible complications that would arise and go undetected if a woman did not have good motivation during her pregnancy?

A Well, I guess a classic example would be to discuss a woman who had organic heart disease, where a decision might have to be made early in that pregnancy whether the pregnancy should be terminated or not. If she was motivated and said she would follow instructions and arrive on given ante-natal appointments, and you knew and felt that [1059] you were dealing with a reliable person, it is possible that with good medical care she could handle that pregnancy and maybe produce a healthy newborn child. If on the other hand she was poorly motivated, was uncooperative, didn't adhere to a regimen of low salt, adequate amounts of rest, periodic checkups, perhaps antibiotics to protect her microvalves from developing complications, then the only time that you might see that woman is when she was admitted into the hospital, or in failure or in trouble, or in a severe infection. And this is the direct reflection of whether or not in actual fact you are dealing with a cooperative, motivated patient or someone who is involved in an indifferent experience.

* * * *

[1068] THE COURT: And the store of knowledge and the bases of diagnosis is ever more exact, isn't that right?

THE WITNESS: Right. But the problem is, if you—if you try to evaluate any one particular patient at any—in any particular setting, and then were to try to interpret that data against the statistical background which might form the basis for a judgment as to whether the life was endangered or not, I don't think—I think the individual would lose out in that evaluation. You could not do that with any degree of certainty.

* * * *

[1076] A I think good medical practice would be to try and anticipate and avoid and set up a basis for even preventing difficulties from developing so—

Q Would you be able to do that under the Hyde Amendment standard?

A You mean in relation to pregnancy?

Q Right.

A In certain situations—I don't think the Hyde Amendment is going to help me in any manner or form because my responsibility as far as pregnancy is concerned is to try and get all the hard data that I can at the earliest possible time and to make a judgment whether this woman could safely go through pregnancy or not.

[1077] If we are dealing with marginal situations with the disease and the data or—is less than certain, delay becomes a factor that we would like to avoid. I think it highly desirable that we avoid delay because it would only result in more complications and more difficulty.

Q Are you saying under the Hyde Amendment you predict there will be more delay in addition on a woman when she comes for abortion as to whether or not her pregnancy is life endangering?

A I think that will occur with a good number of women.

* * * *

[1113] A Well, I'm concerned about the Hyde Amendment because in its current form, and as the Department of Justice has suggested, it will possibly administer the Hyde Amendment. The statement, endangering a woman's life as being a sole criteria for allowing Medicaid

payments will not cover—may not cover a very significant proportion of the pregnancies which few physicians will have all the scientific data that they might want if it exists. And I might have to qualify it categorically and say that some of it may not exist in order to make a measure judgment early in pregnancy that a woman's life may be endangered if she carries her pregnancy to term. And I think that will create in the practice of many doctors parenthetically if the Department of Justice is to examine termination certificates and then on the basis of even if it be a carefuly done statistical analysis of where and who and what the indications are about the termination of those pregnancies, I think that, however well that is done, the fact that that will be presumably the systematic method of atempting to analyze whether there is conformity or non-conformity with the Hyde Amendment, I think that will end up being an inhibitory and undesirable influence in the daily practice of Medicaid assignment.

[1114] Q Are you saying, Doctor, that this inhibitory factor will cause some women not to receive abortions that may, in fact, in your personal opinion, be necessary to avert a life-endangering situation?

A I think that—I think the consequence of the Hyde amendment in its current language will mean that the considered judgment of some doctors may be that we need more time in order to make that kind of decision, that they may as a consequence decide to watch a woman alone, and if they spend that much time waiting to obtain other data which may clarify the uncertainty of a decision that possibly couldn't be made early in the pregnancy or should be made early in pregnancy, the consequence of that for the patient may mean further trouble down the line.

* * * *

[1134] Q One other indication of this list is the chronological age of the woman. I notice on number one you have thirty nine years multipara and thirty five years primipara. Could you explan how these two chronological ages possibly would affect a woman's prognosis as to pregnancy?

A I think that those factors are (of) chronological age are traceable to the biological experiences that we have seen with reproductivity performance. In general it is generally recognized that probably the optimal age for reproducing, even in terms of both maternal and fetal performance, is in the twenties;

that a woman who is thirty five years old, thirty five years of age or older, who is venturing into her first pregnancy, that she has more difficulty, greater risk than a twenty two year old young woman who is venturing into her first pregnancy. The thirty five year old woman is termed in obstetrics an elderly primipara.

THE COURT: It sounds too much like primate.

A (Continuing) And the elderness is not meant to be derogatory in terms of chronological age but the elderness is the reflection of the fact that those woman don't handle pregnancies as comfortably and as well and even in terms of performance, biological performance, [1135] as younger women.

Q Can you explain that further, the biologic performance?

A There are complications, occasionally many of them are unpredictable in terms of—well, one of the problems is associated with the woman who is venturing into a first pregnancy in older age groups, her uterus may not grow as satisfactorily as a woman who has younger blood vessels and a younger uterus. The consequence of that may be that that woman may develop a complication in pregnancy termed pregnancy toxemia. Pregnancy toxemia superimposed on a woman who is in the older age group represents a significant risk and that has been a source of concern for obstetricians. Occasionally in that age group for reasons which aren't clear, that is for a woman who has pregnancy toxemia, well, she may develop suddenly and intrauterine death of the fetus, the fetus is not adequately nourished in that the environment and the placenta doesn't sustain fetal growth with the necessary result being that all of a sudden there is loss of fetal heart tones. It is an entity which does occur with some frequency.

[1136] Q Do these women—strike that.

Is there any significant health impairing factor that may occur during delivery with these women?

A If they manage pregnancy to term, in general they will not have the—as efficient a uterine action labor that younger women will have. That results periodically in the decision that they might be delivered by caesarian section. And this is a—this is a reality which moves into obstetrical thinking to the extent that given a woman who is arrived at age 35 with no previous children, and who is determined to see that pregnancy through, the obstetrician, if he finds himself in a situation where labor is not proceeding satisfactorily, he will probably make the decision to terminate that labor my caesarian section. A surgical termination to a delivery carries with it greater risk than normal delivery.

Q Dr. Romney, if you had a 40-year-old patient who was pregnant for the first time and who strongly did not want to carry that pregnancy, would you personally certify an abortion under the Hyde Amendment standard?

A I personally would. I don't know whether all my colleagues would.

* * * *

[3971a] MS. BENSHOOT: Right. '77 rider.

Q —which states, "When such rape or incest has been promptly reported to a law enforcement agency or public health service." Dr. Romney, if this "promptly reported" is interpreted to be sixty days, I would like to ask you how many women in the Medicaid population, in your experience, are aware of their pregnancy within sixty days of sexual intercourse?

A I can't answer that question in the sense of—I can give you some general impressions.

[3972) Q Yes.

A I can't bring it down to an individual patient determination. I have some very real impressions about that problem.

Q Are those impressions based on your thirty-odd years of experience?

A Yes.

Q Could you give us those impressions?

A I think—

Q Or opinions?

A I think— One of the realities of thirty years of experience in talking to, I would say, a wide spectrum of women of a variety of social-economic classes, I think one of the things that appalls me is the reality that women know so little about their reproductive system. It's amazing to talk to women and ask them about ovulation, how long an egg may survive physiologically or when they think they can become pregnant.

* * * *

[3973] It allows one to seriously wonder in a group of socio-economically deprived ones who probably have not had elementary courses in biology or desire to under what constitutes normal physiology—and I am not sure that statement in the law at a practical level will help or will result in many women receiving medical care as allowed by law.

Q Do you feel that the majority of poor women are aware of their pregnancies within sixty days of intercourse or are aware that they're pregnant, in your experience?

A That's a very tough question. I couldn't—I don't think I can quantitate that. I think that there are—I would hazard a guess—better than fifty percent. I would hazard a guess better than fifty percent of most women, when they skip one period don't think they are pregnant.

Q Do you think that even a higher percent of women in the lower socio-economic group are ignorant of the fact that pregnancy may be a possibility?

A I believe that on the basis of what I've just told you.

[3974] Q Going on to the same population of women, what about for children under the age of fifteen, let's say, sir? Do you feel that these children would be aware that they are pregnant within sixty days to a greater or lesser extent than the older women or the population in general?

A I am sure they wouldn't be. I think there's almost a tragic aspect to that statement, because most young

adolescent females going through the menarche characteristically have irregular periods. Many may not start menstruating until age fourteen-fifteen or thereabouts. Even if they start menstruating, we know physiologically that they have irregular periods, unpredictable in nature, and it takes several years until they physiologically settle down and have some degree of regularity.

I would say there's a very strong possibility that many such young people would have no way of knowing, might never even conjure up the thought that they are pregnant, to say nothing about the fact that in the circumstance that we're talking about here, rape and incest, elements such as fear, perhaps guilt, all might come into this problem. It would be a very difficult problem.

Q Come into it, and have what effect?

[3975] A The effect would be that they would delay going to some physician or clinic for help.

Q In your experience, do children under the age of fifteen generally seek out a pregnancy diagnosis at a later stage than women who are older than that, taken the same socio-economic group?

A I think you can disregard the socio-economic group. I would say teenagers and young adolescents, in general, if they come for prenatal care, they're normally directed there by either a social agency or a domineering parent, and then the child comes for care.

Q Would it be your testimony that this is generally at a later stage, the diagnosis of pregnancy, than for someone over teenage—

A Frequently at a later stage.

Q At what point in pregnancy, at how many weeks, would a teenager be able to notice a physical sign that she may be pregnant, as opposed to the physical manifestation of one missed period or delayed period?

A The uterus rises out of the pelvis, becomes an abdominal organ, palpably, so much so that women or patients will frequently say the first time they knew something was going on was when they were taking a shower, a bath, and felt something in the lower abdomen. That is [3976] generally beyond twelve weeks of gestation.

* * * *

EXCERPTS FROM RELIGIOUS TRANSCRIPT

[Rabbi David Feldman:]

[1858] Q What is the relevance, if any, Rabbi Feldman, of scientific or biological evidence about the development of the fetus to the Jewish law on abortion and the status of the fetus?

A Well, probably there is no relevance because what we are reduced to here is a metaphysical determination. [1859] I don't think it is for a biological or medical expert to tell us when life becomes human. A biologist can tell us when chemistry, protoplasm, an organism becomes life, but when that life passes from potential human life to human life has got to be a metaphysical, religious, philosophic determination rather than a medical, biological one or even a legal one.

* * * *

[Mr. Wogaman:]

[1967] Q What is the importance of the role of ritual in the Protestant faith?

A Well, I suppose that one might say that ritual—would say is a means to the end, the end of the celebration of God, goodness and the end—that is the experience of—ritual constitutes the form. There is always certain danger that ritual means to turn into the end but in point of fact in Protestant theology ritual is not regarded as the crucial thing in defining religious experience.

* * * *

[1968] Q What are the essential aspects of the practice of the Protestant faith?

A I prefer to say Protestant version of the Christian faith, and on all these things there are not great differences. There are some differences between Catholics and Protestants and between Protestants and Protestants. It seems to me the two really crucial things are first our worship of God, our celebration of the goodness of God, and secondly our organizing our lives in accordance with

our experience of faith in God. Those two things go intimately together; without faith and worship on one hand there cannot be true morality, true organization of one's life in the basis of faith. On the other hand without morality there cannot be true expression of worship. Probably the Old Testament says it best: What does the law require of thee is not the ceremonies. These are nice parts of life but "to do justly, to love mercy and walk humbly with your God."

Q Does the fulfillment of responsibilities flow out of worship include making responsible decision making?

A I would say absolutely yes. It is important in our relationship to God that we respond in terms of God's [1969] gift of love to us and a part of our response to God then must be to participate with God in the creation of new life under such conditions that new life can fulfill [God's] intention for new life.

Q. If you had to weigh ritual worship and responsible decision making, on a scale of values on the testimony of your religion, how would you compare their importance?

A It would be worship and responsible decision making in a tie for first place and both belonging initimately together and ritual in the third place.

* * * *

[1970] Q Would it interfere with the practice of your religion for the Government to make it difficult for a person [1971] to make a decision to have an abortion?

A Yes, it would, because if the possibility of an abortion in the early stages of pregnancy is a possible response, free response of a human being who is also a child of God to a dilemma in which the birth of a child might potentially be contrary to God's purposes then the denial of a freedom or the impending of a freedom is an impeding of that person's exercise of what I consider to be her real duty.

She responds to her relationship to God.

Q Is the impediment of this decision making as well as the outright prohibition of acting on the decision also an interference with the process?

A I think I have said so. These are things that can be put on a continuum of seriousness. Some types of impediments are minor, some more serious; but a real impediment to the exercise of that person's responsibility of a responsible parenthood would appear to me to be directly contrary to our understanding of God's purposes.

Q Are you familiar with the Hyde Amendment?

A Generally so.

Q Does the Hyde amendment which restricts funding for abortion, for pregnancies which would endanger the life of a mother interfere with the practice of your faith?

[1972] A It seems to me obvious that it does because the major effect of the Hyde amendment, as I understand it, is in the categories of mothers who are very poor and who must receive their basic income through public welfare. These are people who cannot afford these things which other people in our society can afford. If support for the one medical procedure of abortion is denied or withheld then that person's action would seem to me to be obviously undermined. I suppose theoretically a person could somehow bring together the resources to do this, but it would be a very grave impediment.

Now, the amount of money would not be a grave impediment [to most people] in our society; [but] to poor people it would be. Of course, we are as concerned with poor people, perhaps even more so, as we are of persons of greater means.

Q If the Hyde amendment were expanded to also allow funding in cases where the woman would suffer serious health damage if not aborted, would these restrictions on funding still interfere with the practice of your religion?

A Yes. I have already indicated that the concern here is the whole fabric of the conditions of human existence, and if this is limited only to the case of risk to the health of the mother it would be overlooking a number of other considerations which are also important, that is, I think the [1973] churches out of whose tradition I speak most directly are deeply concerned that

we are not bringing direct or indirect limitations or coercion of any sort on mothers. This should be the decision of the woman. She is the one who should be able to respond out of her faith to the moral dilemma which might be created by an unwanted pregnancy; in our opinion it is not the proper place for the option of the state.

Q If the Hyde amendment were expanded also to allow funding where the fetus would suffer serious health damage, would that too conflict with the practice of your religion?

A Well, again you have added one more possible condition, and there are again others.

Q Is your view that restrictions like those contained in the Hyde amendment interfere with the practice of religion widely shared?

THE COURT: Is the view he just expressed a widely shared view.

A Yes; and I learn each day how much more widely shared it is. In speaking out of background of many relationships with fellow theologians and with church leaders and others who are concerned about this, there really is a grave feeling that the Hyde amendment is a serious compromising of the rights of women as we understand them through our [1974] christian faith.

* * * *

[1988] Q You stated that what is relevant for you is the dawning of awareness; the Supreme Court has talked in terms of viability. Are these two separate concepts to you?

A Yes, they are, because one of them is concerned with the intrinsic reality of the emerging spiritual nature of the new life and the other is concerned with the [1989] necessary life support systems, biologically, needed to sustain the new life in being.

Q So it is simply coincidental that viability, which is a Supreme Court framework and the dawning of human awareness, which is your framework, occur at about the same place?

A That is correct. In one sense it is just coincidental and in another sense it isn't. One might expect viability to occur at that point in fetal development, where those criteria that seem important to me concerning personhood would also be more developed.

Q If there were advances in biological technology that moved the time of viability back in the pregnancy to a very early time, would you then—would that change your views about the time when this crucial phenomenon of awareness occurred?

A Yes. Such as for example, the conjectured testtube babies; no, it would not.

Q You would still hold that it is somewhere around five months where there is an awareness?

A Yes, and indeed to sharpen the matter, if you have the testtube baby developed, one might legitimately raise the question at this point, are conditions such that the birth of this child currently in fetal development in the testtube are conditions which are sure that that life can [1990] be sustained in relationship to what we think to be most important about life.

Q So how do you view the usefulness of science in making the determination of when human personhood begins?

A Well, I think science first of all, what is science; science is the orderly disciplined examination of factual data in areas pertinent to a particular science's discipline. It is of inestimable help to us in our understanding of perceptions of the physical world. Science, however, does not create value.

If I might cite as a kind of an illustration of the point that I would make here, Congressman Hyde in an article which appeared in the Human Life Review this last summer, made a statement about biology and science.

Q Could I have that marked for identification?

A Yes.

THE COURT CLERK: Marked for identification as Plaintiff's Exhibit 34.

Q Excuse me; you were in the middle of something?

A Yes. Well, I just wanted to offer it as an illustration of the problem of thinking in purely biological

or scientific terms. He is, at this point in the article, speaking about the status of the fetus and why, in his judgment, the fetus ought to be regarded as fully human [1991] and in the value sense, from the very moment of conception. He says "theology does not say it is a human being, biology says who is a human being. It is biology that says thou shalt not kill a fetus; that is part of the tradition of the criminal court described by individuals in every civilized nation, and that is what biology says, let's quit kidding ourselves; this is human life." And then the statement, "the old argument that we who oppose abortion are trying to impose our concepts on other people is totally absurd, theology does not annihilate me, biology does. That is a human life, that is not a potential life, it is a human life with potential."

Well, there is a certain special appeal to that, but what he is saying in those words, is that we can know through factual description what the value of a particular entity is,

* * * *

Now, I think I speak for virtually all theologicans and [1992] ethicists at this point in saying a descriptive science cannot establish the value of an entity. In order to establish the value of an entity you have to establish its relationship to ultimate reality that is there, it must be a source of value. To use the language of H. Richard Neibuhr, a theologian from Yale, the center of value is what gives to each of our relative values their final standing. In this case, surely the center of Congressman Hyde's value is not biology.

* * * *

[1996] Q Would you compare your view that conscious decision making is important for your faith with the view held by the Roman Catholic Church on the issue of abortion?

A My understanding of the Roman Catholic view is that abortion is considered to be invariably, or nearly invariably, wrong, and that the hierarchy of that church has taught that for one to be a faithful member of the

Roman Catholic Church, one must not exercise that procedure except under certain narrowly defined exceptions.

* * * *

The Protestant position, generally, as I have described it, and with the exception of course, in the large number of Protestant churches there are a variety of views, but the general position that we have been dealing with is rather that the responsibility for the decision of parenthood, [1997] including even the question of abortion is proper to the religious conscience of the person affected. And, it may well be a proper religious duty of the woman affected under certain circumstances to seek an abortion.

I suppose in all of the whole landscape of ecumenical considerations, of moral issues, this is the one issue of greatest division today on so many areas.

* * * *

[1999] Q Could you explain the religious views which you feel Congress adopted in adopting the Hyde Amendment?

A I think it adopted the view for all intents and purposes that early fetal life has the same value as all other human life, and therefore, presupposing a doctrine [2000] of the relationship between prenatal life and the source of all being, as the source of value.

* * * *

[2001] Q What is the affect of attributing morality to the view underlying the Hyde Amendment?

A Well, I'm concerned as a Christian theologican and member of my denomination, I'm concerned at two points with the effect that it can have. One of them is the effect it has upon the woman in question, who as we have said already, is inhibited, impeded in the potential exercise of her religious responsibility. I am also concerned about the effect this has upon the inter-religious climate and the social effects in our society. This has the effect of pitting religious groups against religious groups, with one group attempting to gain the power of the State in coercing the freedom of members of another religious group.

It seems to me already one can see effects of that including the public discourse and inter-religious discourse in our society. This goes back to the period of 1976, and I guess even earlier than when the Hyde Amendment was first discussed, and then as it was proposed and adopted. There [2002] was a gathering storm of a controversy among, a conflict among religious groups in this country, which was noted in newspapers at the time as a danger, a risk. Then when the Supreme Court—I don't mean the Supreme Court, I guess it was in this Court-enjoined the fulfillment of the effect of the Hyde Amendment, that put the conflict aside and for a period of time there was none. This sense of acrimony and conflict, it was more generally understood that the dialog would go on about the religious question, and it would go on among scholars and people in the religious sphere and the public sphere.

Now, one thing did occur during the period of 1976, which, while not directly related to the Hyde Amendment, would illustrate the dangers of inter-religious conflict and that is, when the whole question of abortion was injected into the Presidential campaign of 1976 by the Catholic bishops, through their interviews of President Ford and Governor Carter, implying in the public record that the one issue of the campaign was the issue of abortions. I don't happen to believe that the Catholic bishops think of abortion as the only interest of importance, I know that they have wide interests, but in the public spheres and in the spheres of inter-relationships, that is what emerged.

* * * *

[2003] Now, with the latest round on the Hyde Amendment now being discussed in Congress, and of course the conflict between House and Senate versions and all that, I see emerging a very strong backlash to use that word among the Protestant religious leaders and theologians, who are [2004] deeply concerned that the power of the State will be employed to give advantage to the point of view which they do not accept and which, in fact, is contrary to their views.

Now, people who are Protestants and who take the kind of views that I have been articulating do not think Catholics or others should be compelled to have abortions. We don't think anybody should be compelled to have abortions. We are speaking of the State neutrality in the area, allowing this to be an area in which people will be encouraged to follow the practices of their own religion, and we say that the Hyde Amendment is a direct kind of threat to that.

* * * *

[2037] Q That would be where a hysterectomy was required and the fetus was in utero?

A Yes, because it's indirect killing and not direct killing. That kind of a distinction in a protestant theological frame of reference is virtually meaningless, but [2038] in the Catholic context it becomes a very important distinction.

* * * *

[2074] Q Congress values the conceptus and values it as you are saying almost substantially as if it had been born, as if it were an after born child. Do you feel that irrational?

A Yes.

Q Why?

A You used the word irrational. I would say it's in that area where pure irrationality is not available to use. If by pure rationality we move from logical evidence [2075] to logical conclusions, it's in the area where a religious position is required to fill in the gap, so to speak, and indicate where the value lies. Now, in that sense I wouldn't want to use the term rational or irrational. I would say it moves beyond rationality on taking a position on religious disputes in our society.

* * * *

[Rev. William B. Smith:]

[2131] Q Doctor Smith, we'll take it without the exception. Let's say, hypothetically of course, that the secular law said a pregnant woman can have only an abortion as treatment for pregnancy and this woman

were Catholic. Would that constitute an interference with her freedom to exercise her religion?

* * * *

A But I think it is an absurd example. I mean childbirth is a treatment for pregnancy.

* * * *

Q But you would, of course, oppose a law like that, wouldn't you?

A I think I would, yes. I'm sure I would.

Q Now, let's say that this hypothetical woman is Catholic and she is poor, she has no money and she lives in a community which is served only by a public hospital and there is no Catholic hospital in the vicinity [2132] or to which she can go, and that public hospital has a policy to perform only abortions as a means for treating pregnancy, they refused to do childbirth, would that constitute an interference with the exercise of her religion?

A It would seem to, yes, however hypothetical.

[2133] Q And suppose that this poor woman is dependent upon Medicaid reimbursement in order to obtain medical care.

A Yes.

Q For her pregnancy, and that the Medicaid program will only give you an abortion. Will only pay for an abortion as a treatment for your pregnancy. Would that, refusal to fund childbirth, constitute an interference with her freedom to exercise her religion?

A You lost me. There are too many ifs in there.

* * * *

[2135] Q I am asking you to accept the hypothetical.

THE COURT: If there is no other service available except this Medicaid hospital, it does not assist in normal births and refuses to do anything except abortions, and she has no other available resource that is relevant to her pregnancy. She's calling it medical treatment.

MS. COPELON: Thank you.

A I would certainly—that would certainly [2136] limit the woman.

THE COURT: Limit the woman?

THE WITNESS: It would limit the woman's choices apparently. There is no choice.

Q And that would violate her—would interfere with her ability to exercise her religious beliefs?

A It would seem to.

* * * *

[Miss Mary Peek:]

[67] Q Can you tell us what some of the reactions were that followed?

Were there calls that you received? If so, tell us what the people said to you?

A Well, there were several. Some of them stand out in my mind. I almost immediately got a call from a woman who said, "I want you to know that I just read the Bulletin, that you favor abortion on demand up to twenty weeks. I have been out and I have torn the campaign sign off my yard, and when my husband gets home, I will take the bumper sticker off his car and we will not support you."

I expressed regret. I said, "I don't understand why you would be surprised. I stated in my literature card that I was in favor of reforming abortion laws."

* * * *

[68] The second call—we had a very large mailing ready to go out to the community and one of the women who gathered about a dozen signatures, one of the women who had gathered those signatures was a Catholic woman, and did get some names of her Catholic friends. Of course there were lots of Democratic names on there. This woman called almost hysterically on the phone and said, "I can't have my name on that leter. If you send out that mailing with my name on it, my life in this community will be ruined. You have got to stop that letter."

Well, I was absolutely stunned and I said, "that it has been run off, the envelopes are all typed, it is all ready to go, and there several hundred of them."

She said, "well I will do something, I will sue you. I will deny that I ever said that you could use my name."

I said, "we certainly do not want to cause you those kinds of problems." I called my campaign manager and said, "don't send out that mailing."

Q In the course of that conversation, did she tell you what she meant by "my life in this community would be ruined"?

A It was clear, since she was obviously very closely knit to the Catholic community in this particular one [69] parish where I had considerable support. I think she felt that she would come in for so much criticism for supporting me that she would not be able to withstand the social pressure that it would bear and it would be very difficult for her. That was the beginning of several calls I had. A couple of very kindly people called and said, "couldn't you change your position? Is it so important in view of everything else that you are—do you really feel that you have to stand on that?"

I said that this is a position that I came to after a great deal of thought and I am not going to abandon it for political expediency, because I know there are times when women need that help.

Q What was your knowledge of that based on?

A Well, mainly my work as a teacher. I have been active in many civic and community affairs over the years, and my husband is a clinical psychologist, and privy to the kind of problems that people bring to professionals in the field, and I just over the years slowly moved in the direction of thinking that was a problem that we had to take care of. We did have to provide help for women.

* * * *

[71] Q Did people call you names?

A Yes.

One or two people, after we moved towards the primary, did come up and say, "I won't vote for a murderer. I won't vote for a baby killer" or "your abortion stand doesn't permit me to vote for you." I remember one Saturday afternoon standing there and a woman came by with her three little children and as she came out of the drugstore, she saw me and just as if she saw some evil beast, gathered her children up and rushed

them down the hall. I realized of course, for some people I was *persona non grata*, because I was not modifying my abortion stand.

Q What was your reaction to this?

A I was really shocked. In Minnesota for many years we have had a reputation for openness, for tolerance, for being a very democratic state—small D. I am not talking about the Democratic party, but the democratic process. I was shocked. I found my children, who were then fifteen and seventeen, being told in school that their mother was a murderer and a baby killer, which was a little [72] unsettling for them, but they were old enough to deal with it. It gives you an example of the kind of miasma of fear and hatred that could exist and I couldn't believe it.

* * * *

[78] Q You described it as poisoning the political process in Minnesota today. Could you explain to the Court a little bit more what you mean by that?

A Well, I think the fact that very often now, * * * has—with varying impacts, almost all candidates are subjected to questionnaires on the abortion issue, whether it is somebody running on the school board or city council, whatever. And there is a quality in dealing with this issue that is lacking in many other issues, even kind of explosive issues. There is a sort of feel about this that is very disturbing.

Now, it seems to me that in Minnesota we really do have overtones of a holy war, a holy crusade, and I think we are on the brink of stirring up sectarian strife.

Q * * * I take it that in Minnesota as elsewhere in the country there was a great deal of very intense division about the war in Vietnam.

A Yes, there certainly was.

Q And you were involved in that?

A Because we had two Minnesota people vying for President over the issue.

Q And would you say that the quality of the character of the division and the way it is expressed today [79] is different from that which was expressed as to the positions on the War in Vietnam?

A Well, the positions on the War in Vietnam were extremely strong, but they had a slightly different quality. I think there is something about injecting religious feeling into something, and I do think that that has been injected into the abortion issue.

I think if you look back over history, if you call up religious strife, you really let the monster out of the cage. And I think there is beginning to be, and there has been in many areas, the religious zeal kind of thing that I don't think the Vietnam War issue had.

Q Is the strife around the abortion issue greater or less than the issue of aid to parochial schools, which I understand is also a substantial issue in Minnesota?

A Oh, abortion is a much more explosive issue.

* * * *

[128] MR. WASHBURN: We have to get the witness's view, or else she has no purpose of being here.

THE COURT: She came here to tell us of her experience, not her philosophy.

THE WITNESS: Or my theology and the kind of [129] questions you have been directing to me in this courtroom are exactly the kind of badgering questions that are levelled against everyone who advocates freedom of choice; and they are made to seem to condone murders in Auschwitz, the death penalty, euthanasia and all those kinds of things when we are not talking about that at all.

* * * *

What we are witnessing here this morning is exactly what is going on all over this country, where people are being badgered and being made to feel they are somehow monstrous if they don't agree with [130] the view that says the Supreme Court decision should be overthrown.

* * * *

[131] Q What do you mean by coerced?

A I think it was made so difficult, so socially hazardous to support a reform position at that time that many of those people ultimately became unable to support me, or to work enthusiastically for me.

Q You mean, there was a community response or institutional reprisal by the church?

A There doesn't have to be an organized, official reprisal. We all know that one of the great punishments that is meted out is shunning, or people being sent to coventry.

When there is social disapprobation, where other people in your church don't speak to you or turn away when you are at the coffee hour, that is a very painful experience. And it is my position that the church had so generated feeling on this issue that people who did not support the [132] church position and did not follow their guidance, with respect to candidates, were liable to that kind of behavior on the part of other people in the parish or they feared that they would be. But the climate was such that they would be and indeed, some of them received phone calls about it, saying, "How can you support that woman?"

* * * *

[Dr. James A. Wood, Jr.:]

[618] Q Would you describe that as a value judgment about ultimate values?

A Yes, I think really [it is]—I am using the word "Conscience" here. I don't have any need to formulate [conscience here], but I would like to pick it up for a moment.

In the earl[ier] days, you see, conscience was far more important than religion.

When John Locke was asked, aren't you the author of Liberty of Conscience, he said, categorically, "No, the Baptists are."

John Milton, a Baptist, this was his great emphasis.

"Conscience" comes from con-scire "To know"—to be morally aware.

From that moral awareness we talk about the liberty of conscience to mean the exercise of one's moral awareness.

Frankly, we view that clause of the first amendment; "the free exercise of religion," in the context of the exer-

cise of one's conscience. It has never meant for example, simply, freedom of religion, but the right to freedom from religion and One's citizenship is to be quite separate from one's religious identity or membership.

So, when we come to an issue such as abortion we see [619] it as not only the right of decision making, but a moral decision. It comes out of some sense of moral awareness of what I should do or we should do in the case of husband and wife, or whoever else is involved in that decision, or the woman alone.

Nonetheless, it is decision making as to what ought to take place and we submit that the very fact that it is made in that context it is a moral decision.

It takes on real religious meaning because it is being absolutized as an ultimate, a supreme obligation.

Q Bringing a life into the world is an ultimate—

A Has an ultimate character of its own. That is to bring a life into the world takes on an ultimate character and religion is a matter of ultimate concern.

Q Would you compare the decision involved in the question of abortion from a Baptist perspective to the decision that involves conscientious objection to bearing arms in war?

A I think the two are excellent as analogies: one with the other or to reinforce the other or vice-versa.

We as Baptists rejoiced when the Supreme Court in the Seeger case recognized that acting out of conscience does not have to be located in a religious community; that seventy eight million Americans are not members of any [620] religious community but they have a conscience.

If that set of value norms, moral norms—and Emanuel Kant defined religion as making these value norms as if they were divine commands. When one does that, saying, I cannot bear arms, that is the exercise of conscience.

So, the Supreme Court, we think, rightly said, it doesn't have to be a Supreme being but when a way of thinking about war, for example, functions for you in that ultimate sense as Supreme authority for your de-

cision, we agree with that and I do suggest that abortion has a great deal that is quite analagous to that.

Q Would you explain that?

A I think in the case also of abortion we are working through the decision making process about a moral judgment, a moral judgment that indeed medical science cannot make.

Certainly, in the first trimester or second trimester, certainly as you proceed with the whole question of stages of development, I would certainly say, wherever this point is, five or six months after the moment of conception that * * * there is a value judgment very strongly involved and even to the very end of the pregnancy there is an exercise of a value judgment.

I have been interested—so often we hear and as I [62] have heard today, the concentration virtually on the fetus,—that we recognize in this particular issue there is of course the sanctity of another human life and it is the pregnant woman herself. She must be conceived in terms of the painful process itself that can only be regarded in terms of a decision making process.

* * * *

[637] Q Could you tell us what the essence of this resolution is?

* * * *

THE WITNESS: I might say the entire resolution prior to the last paragraph was deliberately phrased to affirm the sacredness of life, that Baptists take this very seriously, because the organized opposition, it was felt, was suggesting [638] that, perhaps, as Baptists we're not taking seriously this reverence for life.

All of these are rather familiar within a Christian context about the sacredness of life. The real point of the resolution is in the last paragraph which is the one I would like respectfully to suggest be the one that has any historical significance at all or of interest to the Court itself here.

"Be it further resolved that we also affirm our conviction about the limited role of government in dealing with matters relating to abortion."

* * * *

A I think it's the way we want to say it because, again, there is no theological position on abortion. We are not people who are suggesting that it is an act even we want morally to condone, let alone to espouse. It is not an advocacy of abortion as such. It is, again, the exercise of one's conscience to make that decision for [639] one's self without the intervention of civil authority to do so.

For that reason you'll notice along with limited government, it finishes with words to the effect of, "We support the right of women for the full range of medical services."

And we mean by that, both, of course, the full range of the woman and the fetus for medical services, whatever that may be.

Q Consistent with the choice—

A The choice to be made, yes.

* * * *

[645] Did you indicate Doctor, that the view that the fetus was human from the very beginning was regarded as itself a value judgment to be made in conscience?

THE WITNESS: Yes.

THE COURT: And not as a biological—

THE WITNESS: Not as a biological fact, no.

In other words, there are people whom I actually know as ministers and laypersons who vigorously support the publicpolicy view of the Baptists in this [646] regard to the Supreme Court decisions who, at the same time, morally and theologically hold to a view that for them abortion is completely out of the question.

* * * *

That would not however be, I take it, from what you earlier said, something that they would seek to instruct their congregations that they should, in conscience, share with them.

THE WITNESS: I think they would feel perfectly free, your Honor, to see it as something even they could include in religion and moral education, but they could not—it could not mean calling upon Government and civil authority—

THE COURT: I am clear about that, but is it a view that they would feel free as Baptist ministers to try to persuade their congregations to share and act on?

THE WITNESS: Yes, in the sense that one is no less a Baptist for holding that point of view.

One's credential as a Baptist minister would in no way be eroded or jeopardized by affirming that theological point of view.

* * * *

[647] Q Are these letters, examples of the kinds of letters you receive taking issue with position of the Baptist Joint Committee?

A Yes. I would have to spend some time, I think, being completely categorical with this, but if I may make a general statement because it's based on honest reflection and at the moment I think I have never received—and I have received a number of these letters—and all of these letters expressed opposition in the manner that these do; verses of scriptures that are cited, religious statements cited and it has to do with their feeling intensely the immorality of abortion and therefore their inability to support the Baptist body or Joint Committee on this.

[648] They see abortion as immoral, and therefore they would be opposed to a policy.

Q You used the words "Moral" and "Immoral" and "Value" in describing the personal beliefs of some Baptists.

Would you describe those beliefs are religiously based or based upon an interpretation of duties such as you have described to be religious or within the realm of conscience?

A I do and not only for Baptists, but I would do this with regard to all persons. Whether they think of themselves as religious or not is not the real point.

Religion has a functional definition and once we talk about moral norms and values they inherently are religious in character.

Religion is a sense of the sacred. Religion is a sense of the ultimate concern. Religion has to do with moral

imperatives which one regards, if he is theistic in his beliefs, as devine commands, whether one is agnostic or not in a formal sense.

* * * *

[649] I read—of course, virtually all the Baptist publications coming across my desk—and I must confess that it has been very interesting to me but I never read statements of which I have any recollection from any Baptist in opposition to abortion who did not put it in very religious terms.

* * * *

[655] Q Congressman Hyde talks in terms of there being biological evidence or it being clear that the fetus is an actual human being from the moment of conception.

Could you compare your understanding of the biology with the view that Congressman Hyde is expressing?

A Well, I don't want in any way to appear disrespectful of the intelligence or integrity of Congressman Hyde in making such a statement and I accept the sincerity as to it, but for any person simply to make the statement that it is biologically evident—as far as I am concerned that is a moral judgment he is making. It is precisely because it is not biologically evident.

I think many of us have serious questions about the way in which biology and science are being used to tell us that the question has been answered. It has not been answered. It is a moral question ultimately.

Q Do you view it as also a religious question when you use the term "Morally"?

A Yes, I do, I do.

It is by the very nature of a functioning definition of religion which is giving ultimate authority and status which has to do with moral norms.

* * * *

[657] Q Now, in terms of the Hyde Amendment, the restrictions of Federal funds on abortions except in limited circumstances, do you also view that as interfering with the right of conscience of women who might not share that religious view?

A Yes, I do. But I think it carries with it a terrible stigma to be imposed on the women of this country; namely, that we have a—we have public funds available for medical services and this Government presumes in an almost arbiter of the morals of the people of this country to be saying, you may have public funds for a vast panoply of services including child delivery services, but if you elect abortion—I see it as not only discriminatory and punitive but also as morally offensive for the Government to enter that arena and place that kind of stigma, not only on poor women by on the citizens of this country and to do it after the Supreme Court spoke as it did after January, 1973.

* * * *

[660] Q Now, are you familiar with the problem of violence erupting around religious controversy?

A Yes, I've been agrieved and disturbed in recent months because of what's happened in Planned Parenthood Operations, clinics, this kind of thing. I must say I realize—I'm speaking with candor here—but that's why I was asked, I presume, to be in this place. I'm very much a part of the ecumenical movement. I'm very much a part of Catholic-Baptist dialogue and by the way, I've attempted to speak to the abortion issue in Catholic dialogue sittings which involve several bishops of the church, but I am disturbed by the absolutist viewpoint that seems to have with it complete intolerance for any of the rest of us in this society. I must say I feel deeply offended and a sense of indignation to be called a murderer by seeing such tags on the bumper stickers of cars.

I think it's outrageous in this society or to be asked "You have no regard for life?" That is a viewpoint that, it seems to me, is of the mentality that is frightening. It is polarization of the worse possible kind.

When we talk about political divisiveness on the parts of religion in this country, we haven't seen it in [661] the history of this country, what we would have, if, indeed, the Right To Life Movement is able to enact into law through abridging the First Amendment. This is a policy for this country. It will be divisive in a way we have ever imagined in the past.

We have many cases where people are killed, churches burned, religious rights, of course, in the streets of American cities. Yes, I am deeply disturbed over that aspect. It's not my concern about the theological and moral absolutism. That's quite another matter, but the unwillingness to tolerate even other people, reasonable people, good people, yes, even Christian people and Jewish people who out of their conscience feel very differently about the abortion issue.

* * * *

Q I have one more question. You described this as potentially more divisive than any other. Do you see a potential divisiveness and I would say, also, violence in a movement which claims religious authority for the proposition that other people are murdering.

A Yes, that's really what, in effect, I was trying to say. I mean to have a movement—it's one thing to talk about, for example—whether public funds should [662] or not be used for church hospitals or parochial schools and so forth. That's a matter of open debate, dialogue. At least, we're not accusing others, even, of being thieves, but this, to say to a woman or to a husband or to anyone who holds that point of view about abortion is a rightful medical service to be available that Government should not prohibit this, that these people, if not actual murderers, they believe in murder, I think, is polarization of the worse possible kind. It's an outrage in this kind of society.

I think it has the seeds not only of violence but the seeds of disintegration. It cannot make for unity, ever, cannot make for reconciliation, but permanent and irreparable division in this society.

* * * *

[680] Q Suppose a woman with nine children who is now pregnant with her tenth decides she is going to have an abortion simply for that reason and that is the only thing she takes into consideration. She doesn't want to have another [681] child at that point in time or perhaps ever again. Is that a religious decision in your view?

A For her it would be, I'm sure.

* * * *

[682] We find people in every conceivable situation in this country. Some people take their lives and situations with the utmost seriousness and some do not and an awful lot are in the middle so I cannot accept—I don't know that this is the time or place—but I cannot accept as a premise that everyone goes through this soul searching, just as I cannot accept the premise that everyone takes their life that seriously.

THE WITNESS: May I comment?

I think that a woman with nine will take seriously the option of ten. She knows something about it.

We have this all up and down the line, the depths of decision making, conscientious objection. I happen to think it fortunate the Government does not have that kind of competency to determine the depth or degree of soul searching, the extent of anguish [683] and pain that persons experience to arrive at that point of decision making and obviously that pregnant woman with an I.Q. of 45 or 50 may be different in the decision making than a woman with an I.Q. of 140. But there is a right to privacy as to the most intimate of all human relationships which must be respected with regard to how far the Government has a right to intervene in the lives of human beings.

* * * *

[713] Q You mentioned the limited role of Government funds and the United States Supreme Court, I think, made this point in some of the cases: If you want Government out of this religious decision of whether or not to bear or abort a child—is Government funding not an entanglement of Government necessarily in that decision just like the funding of parochial schools?

A Yes.

This is what is wrong with the Hyde Amendment: It violates also—not only is it not neutral, but it repre-

sents gross entanglement of institutional Government into the moral and religious values of the people of this Country.

Q But if we repeal all Hyde Amendments and put it back to where it was before any Hyde Amendments, you would still have plenty of Federal funds entangled in the abortion decisions. As a matter of fact, they would be completely funded.

A I fail to see the point of the Government providing for medical services, whether abortion, delivery, tonsilectomy—what is religious about the medical services of abortion? The decision making is, the service is not. [714] It is secular.

Q So, when they are funding abortions as medical services that is a secular act they are funding. It is not like funding parochial schools.

A It is very different, very different.

* * * *

Is there a distinction between the secular acts, the medical procedure and the religiously, perhaps, formative decision of whether or not to participate in that medical procedure?

A Indeed.

Q What I am saying is aren't the funds or not funds of the medical procedure necessarily all entangled in religion or is it only when we cross the point of getting into the decision that we invade that area?

[715] A It is the refusal that becomes the entanglement because it is the act of withholding funds.

* * * *

[745] Q Are you saying his biology is wrong? That's what I though you said but I wasn't sure.

Are you saying he's just in error biologically?

THE COURT: I would prefer—what Dr. Wood said, as I recall, the argument of humanity did not flow as evidence from the biological data.

Q Is that correct?

A It's a value judgment, correct.

* * * *

[Dr. Lillian Lindt:]

[4094] Q Doctor, why did you choose the legislative debate to study?

A I chose it because in dealing with this issue, and having only limited time available, it was important to find something that dealt—it seemed to me—with some of the major issues relating to the ongoing debate which is, obviously, a much larger issue in all of American society, but which is a single individual action.* * * [F]rom a sociological standpoint, and it seemed to me here, that the legislative history was particularly informative because it brings together at a very critical point a wide range of opinions, attitudes, beliefs, concerns that presumably reflect some of the same considerations that are going on in the larger society.

* * * *

[4096] Q Could you tell us what you found in examining this debate?

* * * *

The major themes that I saw running through the debate had to do, first of all, with an issue that was time and time again defined in religious and moral terms. Secondly, [4097] there was also an important issue, and concern over matters of quality of life. Thirdly, but to my mind perhaps a little surprisingly, there was far more limited reference to any biological and scientific and medical preoccupation. There certainly was some, but it did not appear to be, you know, a dominant theme. And last and perhaps it shows my lack of familiarity with congressional legislation, I was rather surprised that since, technically this was a rider on an appropriations bill, there was remarkably little consideration about matters of fiscal policy or economic issues, or broadly, political ones.

So those are, you know, some of the broad themes that go through that. Now, on the dominant ones I will speak to that more precisely.

Perhaps one of the more surprising themes even for a sociologist of religion here was to see how often re-

ligious and moral themes were activated, and they were activated in a number of different ways. First of all, there were quite a large number of references to explicitly religious concepts; references to God, God fearing, God given rights, religion, religious beliefs, religious values, religious convictions, references to the human soul, to immortality, to sin, religious wrongdoing, innocence, forgiveness, sacredness, sanctification, matters of conscience, [4098] matters of prayer. These are all just concepts but as a sociologist of religion, all of these evoke some fairly standard religious references.

In addition there were some things that weren't so much conceptual but actual themes. One of the prevalent ones had to do with the theme of the slaughter of the innocent, an obvious reference to Herod, and the slaughter of, in that case, innocent children. There were several references, for instance, to the biblical injunction, "forgive them for they know not what they do," references to "thou shall not kill"; so these are some of the things, some of the language that certainly is evocative of much of the Judeo-Christian tradition that lies behind it.

In addition, there are some, from a sociological point of view, equally important but perhaps more implicit indicators. For example, when you look at the ways in which the fetus is portrayed here,—the actual conception of the fetus in this debate,—it became clear that in terms of a description of the fetus, the stress was very rarely on the fetus per se; it was much more common, and this was of course particularly true of those taking an anti-abortion stand, to define the fetus as a human being, human life, fellow human, and child, baby, infant, son, daughter, and even Christian. Now, these are still references to the fetus, [4099] and there again, I would simply comment on that, and say the reason I find this surprising is that from one point of view, at least the fetus is a concept that really arises out of a very different body of knowledge and information, namely out of biology and the medical sciences. And, when you deal then with the fetus as a human being, as a human life, it becomes clear that you are dealing with issues that the biologist

per se, does not address, and there is in this legislative history, for instance reference to testimony by Lederberg, for instance on the fact that he had to define from a scientific point of view, the question of when does human life begin. He would have to come back and ask the question of what do you define as a human.

* * * *

[4100] The importance here of the human element in terms of the Judeo-Christian preoccupation with the soul, and, secondly, with regards to that conception of the fetus, you find not only an important stress on description, but you find perhaps even more strikingly a whole range of evaluative comments: the fetus is defined here as vulnerable defenseless, little. Now, you might say from the point of view of those adjectives, that from a purely medical or social, or psychological point of view one can relate the fetus with the themes defenseless, or vulnerable, or at least more vulnerable. And there, again, it's not necessarily a peculiarity of this human fetus because from that point of view, I suppose even a baby walrus, or a guppy, or a puppy in that sense are similarly defenseless or vulnerable, so those adjectives were perhaps not so puzzling. But what was puzzling was the conception of the fetus, again in value terms as innocent, and here again it struck me that what is at issue is an important religious dimension, because when we talk about innocence it is clear here that even in this debate there is a notion of innocence as informed [4101] by the older Hebrew and Greek conception of innocence, as a freedom from something, usually a freedom from guilt or a freedom from sin. And, again, I would suggest this notion of innocence of the fetus certainly in religious terms tends to be viewed as related to the notion of God-given life and of the sanctity that is implied there. So much for the actual perception of the fetus and let us now turn to the conception of the woman carrying the fetus, because here again I was struck by the fact that this woman is seen primarily in one sociological role, the role of pro creator and of nurser.

[4102] Again, it was interesting again that rarely is there a reference to the woman, for example as a person, even though we have some references to the fetus as a person, but the woman is seen primarily in the role as procreator, and she is seen moreover as an adult, fully responsible for her actions and at least implicitly here, a kind of comparison with the fetus that presumably is not fully responsible. Moreover, just as in the conception of the fetus you have both the descriptive and evaluative component, so here in the conception of the woman carrying the fetus there is a strong evaluative dimension, but it runs in the very opposite direction of innocence. Where evaluative comments are made, they tend to be in terms of a woman who has erred, or has gotten herself in trouble, an immoral woman. There are even occasionally punitive comments, women must be punished if they do not bear the responsibility for avoiding pregnancy.

Now, it struck me here again that if you're trying to account for this stress on the procreative role and on the notion of the woman as someone who has, in a sense sinned, that the reference certainly doesn't come from biology. In sociology you don't have the same

* * * *

[4103] Now, a third aspect I would like to comment on has to do with the conception of the act of abortion, because, here again the conception is far from value-neutral. The terms such as a killing, death giving, murder, slaughter, crime, heinous crime, extermination, execution, suggest the degree to which this is a deeply value-laden preoccupation. Now, the other thing that struck me here is that in dealing with the act of abortion, again, so much of this debate is caught up in these evaluative preoccupations with the act itself. There is remarkably little debate about abortions, for example as a medical procedure.

Then the third point I would like to make here is that the reference to the decision about abortion, and to some extent also the decision about abortion legislation are time and time again defined as matters of conscience, matters of moral sensitivity, matters that must be decided on moral grounds. Now the question there, it seems to me becomes where does this morality come from, what forms it. Is it essentially a secular morality, or is in informed by a sacred concern? Here I was struck [4104] by the fact that when you look at references to the morality issue personally, you find that very often even though moralities may be identified as such, it is alligned, either in the same sentence or in the same paragraph, with references to explicitly religious language. So that, for example, at one point, one of the congressmen says each one of us must—sorry—each one of us is going to vote our own conscience, our own conscience here today. But when you look at the context in which that statement was made, you find in the very preceding paragraph that same congressman indicating that he was preoccupied about raising his adopted daughter in a Christian home. So, it seems to me that there the close parallel between conscience and specifically Christian home suggest that there are some important religious references.

Now when you look at it from another point of view, you can say well, what about some alternative reference—

THE COURT: What reference?

A Reference in terms of how do you legitimate your moral position. Here I was struck that, for example, some of my colleagues in philosophy of religion and philosophers outside of religion, have after all dealt [4105] with ethical issues such as abortion. Yet in the legislative history there are no references to philosophers as authorities. You can say well, in terms of every day men in America, they don't read philosophy. But here we are reading about congressmen, we're dealing with senators, many of whom certainly read philosophical works, and all I'm saying is there are no efforts to legitimate the morality in terms of distinctly philosophical positions.

Moreover, you could again argue perhaps here, that from a purely anthropological point of view, you could say that these are statements about morality that are

gounded in the very nature of the human animal, and that in all society similar moral positions are taken with regards to the matter of murder of the fetus. But the anthropological evidence will not support that theory, and if you look at the compilation of the human relation area files which include materials on a very, very large number of societies across the whole world, you are struck by the fact that there are important variations on this very theme.

So what I'm saying here then is that this preoccupation with matters of morality, with matters of conscience, does seem to be relating again in an important [4106] way to religious considerations.

Lastly, I would just like to comment briefly on one other thing that runs through much of this legislative history, and obviously was of deep concern to the legislators themselves, namely the depths of feelings of emotions and the divisiveness both now and potentially of the whole abortion issue. Now it seems to me that that very depth of feeling, that very divisiveness has to be accounted for, at least in part, with reference to the religious character of the debate, because it is precisely when positions are informed, are legitimized, are defended on the basis of convictions that are held by virtue of one's faith,—by virtue of truths that are held to be sacred, that are validated however in terms of something that is beyond empirical documentation, that you either accept on the basis of faith or you reject,—compromise is virtually impossible. It seems to me there that again when one looks back in history, we are all aware of the fact that some of the most bitterest and divisive battles among human beings as individuals and groups as well, have always been fought over battles involving a religious dimension. This is particularly because the legitimacy is to some higher authority that can be in one sense never challenged, because you [4107] either accept it absolutely or you do not, but compromise is, in a sense, ruled out. I am suggesting that is simply one aspect that feeds into the whole divisiveness of the issue which is reflected in the legislative history.

* * * *

[4110] Q Also, in examining the debate, did you find much reference to denominations or self-identifications by the Congress people?

A Yes, that is actually a rather surprising point, because—first of all, let me say I was surprised by how often somebody without being asked simply volunteered—not just volunteered—but seemed to think it was important to say, "Look, I happen to be a Roman Catholic," or "I happen to be a Baptist," to cite not religion at some point, but religious affiliations, really religious commitment, as though this was presumably somehow a necessary fact toward information in order for others then to understand what that person has to say.

Again, you say why is it surprising? After all, these people have many different roles in American society, one of them is a religious affiliation very often. But what I suppose struck me as surprising is that after all we're dealing primarily in a political arena; moreover, in terms of the whole issue of church-state relations, I would have thought that there might be a particular sensitivity to the problems of, in any sense, bringing religion in here. So there would be a kind of built-in bias to try to keep it out and yet, in spite of this, [4111] what I'm saying is that it was remarkable that people, time and time again, wanted to identify themselves in terms of religious affiliation or with regard to that. One was struck, first, by the fact that on several occasions a Senator or Congressman felt it necessary to say, "Look, we really should not bring religion into this." Presumably, you don't say that unless religion has already been dragged in.

Q Several times in your testimony you talked about religious and moral concerns. I would like to ask you, on the basis of your examination of these debates, whether or not you think these terms are different, referred to as being different things or whether they mean essentially similar things in this particular debate, not as a general matter, obviously.

A In this particular debate, the differentiation of the two is complicated by the fact they're not mutually exclusive. When you deal with religious concerns, very di-

rectly what is being addressed is not simply a concern or a belief, but a moral position or a moral commitment that is informed by certain religious conceptions or certain religious values.

In that sense, you cannot say, "Here is [4112] religion and over there is morality," but at least in principle it is certainly possible that you can have a set of moral positions that are grounded in something other than religion and all I can say there, again, looking at the legislative history, was that it was remarkable how empty that testimony was in terms of such references.

* * * *

[4118] Q What was the dominant element, in your opinion?

A The references to the saliency and importance of the whole matter of abortion, decisions that were made about it, and therefore legislation that affected it with reference to deeply felt beliefs, values, commitments, concerns, that, where they were legitimated or authorities were cited, were done so with reference to traditional religion.

* * * *

[4162] Q As an expert in religion, do you feel that a congressman or a senator, when they use the word "innocence" as thinking at that point in religious terms?

* * * *

A In certain cases it's explicitly linked to religion; in other cases it is not, but I'm simply saying here the notion of innocence makes no sense outside of an essentially religious frame of reference. That's [4163] where it gets its meanings from.

If you look at the OEDT roots, clearly have reference to the notion of freedom from guilt, and in terms that presupposed then some notion of a fetus that is free from guilt precisely because of a religious significance that it was given. After all, in the Judeo-Christian tradition in terms of the whole theme of the fall of Adam, the sinfulness of men, and by contrast, the notion, however, of the human soul and of the fetus here as something, a

gift of God and as something that, until it actually is living in society, therefore, has this God-given innocence.

I'm not saying this is necessarily what is uppermost in every congressman's mind when they talk about the innocence of the fetus, but I'm suggesting, simply in terms of American culture, that the prime reference, when you look for why on earth do we talk about the fetus, not simply as helpless or weak or little, or defenseless, but innocent, that the only source I can find for legitimating that is an essentially religious one.

* * * *

[4214] MR. WASHBURN: Your Honor, the conclusion of the witness, as I take it, is that the word "human being" when used in connection with the word "fetus" is something that has a strongly religious connotation.

Q Is that your conclusion?

* * * *

[4215] I was impressed by the number of times there were these assertions about the essential humanity of the fetus, of it being something that is not living, but is fully human and when I then looked for "How do you know that it's fully human?" the references were disproportionately to considerations that ultimately are religiously grounded, to relate back to the theme of the preciousness of that fetus because it is God-given, because it has a soul, because of the theme I mentioned about the innocence of it, which is a clue of an important religious component.

* * * *

[4698] Q Dr. Lindt, you testified earlier, two weeks ago, that the two most pervasive themes that you found in the legislative history were the humanity of the fetus and the quality of life.

Have you had occasion to examine the presence or absence of those themes on each side of the debate since you appeared the last time?

A Yes, since that was a question that several people here had raised.

* * * *

A On those two major themes I would say that, with regard to the preoccupation with the essential humanity [4699] of the fetus, that is found overwhelmingly on the side of those who take a pro-life position. It's not to say that it doesn't occasionally occur on the other side, but when it does, it's invariable in reference to finding that humanity at some point later than conception.

* * * *

Now, by contrast, when you deal with the quality of [4700] life issue, again, there is a difference, an important difference. Most of these tend to be raised more immediately by those who were opposing the various amendments; but again, where they are raised, they become a part of the debate. They cannot simply be ignored; but the interesting thing is that, when the pro life people take them up, they tend to give them a lower priority and, in effect, say, "look, this isn't really where it's at. We're talking about protecting that essential humanity of the fetus."

* * * *

[4701] There is, throughout the debate this preoccupation obviously, on all sides, with what are defined as essential issues of morality; and obviously, they are not exclusively religious by any means. There are important secular components, but when it comes to the essential question here of establishing the humanity of that fetus, it's at that level, it seems to me, that the moral issues come back time and time again to religious definitions of that humanity and religious legitimations of it.

* * * *

EXHIBIT 14

Maternal Mortality Attributed to Complications of Pregnancy and Childbirths, excluding Abortion and Ectopic Gestation, by Woman's Age and Race: United States, 1972-74

Age (years)	Rate per 100,000 live births		
	Total	White	Other
Under 15	32.0	5.2	16.8
15-19	10.4		
20-24	8.7	7.1	18.1
25-29	10.6	9.3	28.8
30-34	22.9	18.9	66.4
35-39	41.4	33.6	112.7
40-44	67.3	71.9	164.7
45 or more	151.5		

Teenage Pregnancies

Two out of thirteen first births in the United States are to girls who are so young that they are biologically "at risk" in childbearing. In 1973, a total of 616,957 girls under 19 years of age gave birth. Of these, 604,096 were between 15 and 19 years of age and 12,861 were under 15 years of age. There were 299 second or later births among mothers under 15, and parity was not reported for 1,150 other mothers in this age group.

The 1973 birth rate was 59.7 per 1,000 for girls 15 to 19 and 1.3 per 1,000 for girls under 15. These rates reflect an 8 percent increase in the number of births to girls under 15 between 1972 and 1973, although all other age groups of women showed a decrease during this period. The birth rate for the 15- to 19-year-old group declined nearly 4 percent from 1972 to 1973.

In the United States, the average age of menarche is 12.5 years, and girls' average age for complete physical maturity is several years later. Girls are at increased risk biologically and emotionally if pregnancy occurs before they complete their own physical growth. (19)

Neonatal, postnatal, and infant mortality rates are much higher for infants born to very young mothers. Statistics showed that for infants of mothers under 15 years of age in New York City in 1968, mortality was 107.3 per 1,000 live births, compared with 21.5 per 1,000 live births in the 20- to 24-year-old age bracket. For infants of mothers under 15, 20 percent weighed less than 2,500 grams at birth compared to 9.7 percent of those born to the 20- to 24-year-old group. (See table 4.)

Studies show that pregnant adolescents have higher rates for toxemia, prolonged labor, premature delivery, pelvic disproportion, and cesarean section than more mature women, and therefore require more intensive maternity care.

* * * *

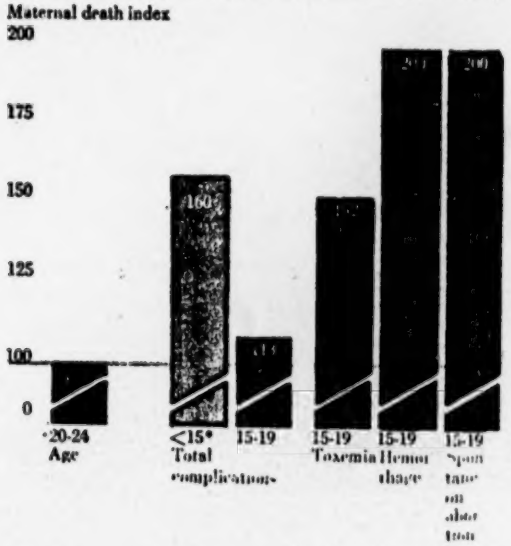
Many pregnant girls are classified as high risk because of social situations that expose them to a wide range of additional health and mental health problems. Efforts to minimize these social conditions and to maintain educational continuity must also be considered in the management of teenage pregnancy. Ideally, suitable health care should be combined with academic programs to prevent the loss of a school year or permanent dropping out of school.

Available family planning services should be accepted and used by the sexually active teenage girl. If a test for pregnancy becomes necessary, the girl should be referred for family planning or prenatal care as indicated by the results. Some young women may wish to receive counseling about abortion services, depending on individual circumstances.

* * * *

EXHIBIT 21, pp. 22-23

Figure 17. Risk of fatal complications during pregnancy, labor and childbirth to teenage mothers and mothers 20-24, United States, 1974 (Risk to mothers 20-24 = 100)



* Numbers too small to calculate ratios for individual complications.

Figure 18. Risk of nonfatal complications of pregnancy, labor and childbirth to previously nulliparous 15-19-year-old mothers and 20-24-year-old mothers, United States, 1960s (Risk of complications to mothers 20-24 = 100)

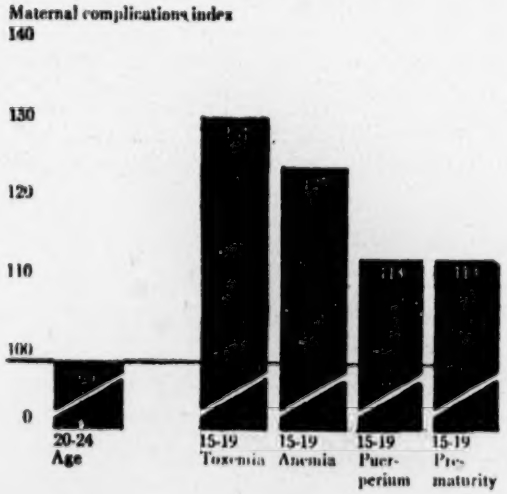


Figure 15. Risk of death in first year of life, per 1,000 infants of mothers aged 19 and younger and mothers aged 20-24, United States, 1960 birth cohort (Risk to babies of mothers 20-24 = 100)

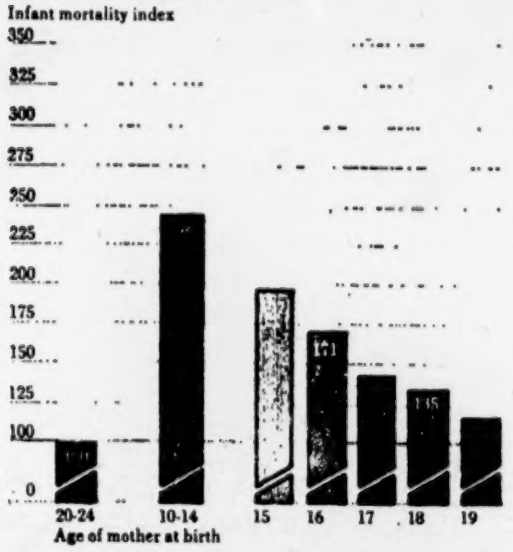


Figure 16. Risk of low birth weight (≤2,500 g) among babies born to teenage mothers and mothers aged 20-24, U.S., 1973 (Risk to babies of mothers 20-24 = 100)

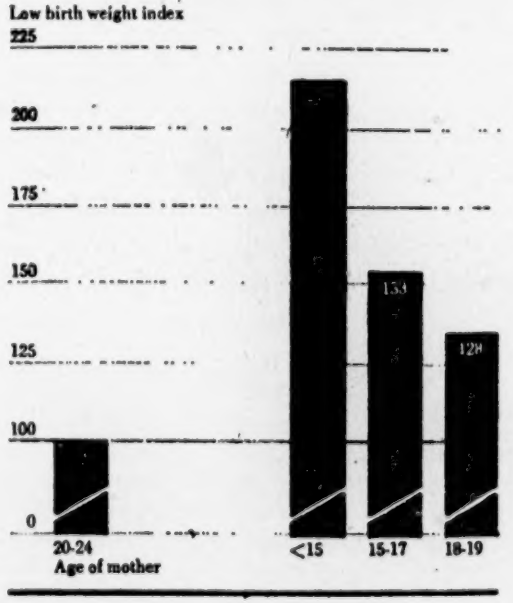


EXHIBIT 24, TABLES 1 AND 3

Table 1. Estimated number of abortions and total expenditures under Title XIX (Medicaid) and Title XX (Social Services) of the Social Security Act, by state, FY 1976*

State	No. of abortions	Expenditures
U.S. total	260,800-274,400†	$60,907,000
Ala.	1,300	338,800
Alaska	300	17,600
Ariz.	‡	‡
Ark.	500	61,300
Calif.	70,000§	24,411,700§
Colo.	2,800§	110,300
Conn.	2,000§	427,500§
Del.	400	44,100
D.C.	7,400§	1,419,800§
Fla.	1,600§	229,300§
Ga.	3,700§	948,600
Hawaii	1,200	212,100
Idaho	u	u
Ill.	18,300§	2,667,100§
Ind.	u	u
Iowa	1,000	297,300
Kans.	3,700§	300,000§
Ky.	900	197,400
La.	u	u
Maine	500	212,100
Md.	5,000§	1,675,000§
Mass.	5,100§	1,105,300§
Mich.	14,800§	2,432,200§
Minn.	1,300	215,700
Miss.	u	u
Mo.	2,400§	180,000§
Mont.	700§	210,000§
Nebr.	300§	11,700§
Nev.	400**	200,000**
N.H.	200§	31,300§
N.J.	100,000§	3,500,000§
N. Mex.	900**	164,700**

State	No. of abortions	Expenditures
N.Y.	50,000§	7,875,000
N.C.	3,100**	1,109,800**
N. Dak	u	u
Ohio	10,000§	2,000,000§
Okla.	700	59,200
Oreg.	2,000§	547,000§
Pa.	10,000§	1,913,100§
R.I.	1,000§	96,300§
S.C.	1,400**	248,900**
S. Dak.	u	u
Tenn.	1,200§	274,700§
Tex.	13,300**	3,500,000
Utah	300§	25,200§
Vt.	300§	179,800
Va.	5,200§	463,100§
Wash.	2,700**	640,000**
W. Va.	300§	91,500§
Wis.	2,500§	250,000
Wyo.	100	12,500

* These estimates differ somewhat from those published earlier. The earlier estimates were based on actual reports from 17 states. These updated estimates include actual reports of abortions and/or expenditures from 32 states and the District of Columbia.

† The 260,800 estimate is the sum of the state totals; the 274,400 estimate is from the AGI 1977 sample survey of abortion providers.

‡ No Medicaid program in FY 1976.

§ Based on Title XIX state reports.

** Based on state reports of Title XIX and Title XX Estimated expenditures and number of abortions performed under Title XX are Nevada, 25 abortions, $12,500, New Mexico, 400 abortions, $77,800; North Carolina, 1,700 abortions, $624,855; South Carolina, 900 abortions, $162,900; Texas, 9,500 abortions, $2,491,700; Washington, 300 abortions, $39,900.

Note: u = unavailable.

Table 3. Average abortion cost, average monthly family AFDC payment and ratio of cost to payment, by state, United States, FY 1976

State	Average abortion cost*	Average AFDC monthly payment†	Cost/ payment ratio
U.S. total	$280	$238	1.2
Ala.	310	113	2.7
Alaska	293	297	0.8
Ariz.	207	141	1.5
Ark.	307	135	2.3
Calif.	379	297	1.3
Colo.	301	205	1.5
Conn.	409	266	1.5
Del.	460	207	2.2
D.C.	239	242	1.0
Fla.	211	139	1.5
Ga.	214	97	2.2
Hawaii	430	363	1.2
Idaho	400	256	1.6
Ill.	225	269	0.8
Ind.	244	168	1.5
Iowa	310	247	1.3
Kans.	379	229	1.7
Ky.	199	171	1.2
La.	160	119	1.3
Maine	274	193	1.4
Md.	280	175	1.6
Mass.	218	300	0.7
Mich.	232	296	0.8
Minn.	278	266	1.0
Miss.	460	48	9.6
Mo.	167	137	1.2
Mont.	383	173	2.2
Nebr.	202	210	1.0
Nev.	250	157	1.6
N.H.	321	217	1.5
N.J.	280	263	1.1
N. Mex.	289	140	2.1

N.Y.	309	363	0.9
N.C.	331	154	2.1
N. Dak.	160	256	0.6
Ohio	202	195	1.0
Okla.	169	203	0.8
Oreg.	415	260	1.6
Pa.	298	283	1.1
R.I.	448	263	1.7
S.C.	226	85	2.6
S. Dak.	160	205	0.8
Tenn.	196	104	1.9
Tex.	208	104	2.0
Utah	184	246	0.7
Vt.	181	255	0.7
Va.	253	191	1.3
Wash.	223	252	0.9
W. Va.	460	196	2.3
Wis.	241	296	0.8
Wyo.	460	196	2.3

* The average costs for a hospital abortion ($460) and clinic abortion ($160) were derived from the AGI provider sample survey. For each state, these averages were multiplied by the percentage of all abortions (from the 1976 AGI abortion survey) performed in hospitals or in clinics and physicians' offices. The results were summed to obtain the average abortion cost in the state.

† Average payment per family, from National Center for Social Statistics, DHEW, *Public Assistance Statistics*, February 1977, June 1977, Table 4A, p. 7.

EXHIBIT 27

Table 7. Percent of contraceptors who fail to delay a wanted pregnancy or to prevent an unwanted pregnancy in the first year of exposure to risk of an unintended conception, by contraceptive method; unstandardized percent and percent standardized on distribution by intent and relative age* (N, in Italics, represents the unweighted equivalent of the denominator)

	Percent failing	
Method	Unstandardized	Standardized
Pill	6	6
IUD	8	12
Condom	17	18
Diaphragm	23	23
Foam	31	31
Rhythm	33	33
Douche	45	39

*Based on monthly pregnancy rates for intervals of orders two through five, calculated for ever-married women, born since July 1, 1925, and interviewed in the National Fertility Study.

EXHIBIT 144

Number of Abortions Performed at Bellevue Hospital Center from January 1, 1969 to July 1, 1970, and Proportion Interviewed by Author (Judith Belsky)

Year	Number of Abortions	Number of Patients Known to Author	% of Total
1969	57	37	65%
1/1-7/1/70	302	285	94%
Total	359	322	90%

EXHIBIT 146

SUICIDE ATTEMPTS DURING PREGNANCY
NUMBER OF PATIENTS

	Before Committee Abolished	After Committee Abolished	Total
During this Pregnancy	12	2	14
During a Previous Pregnancy	10	1	11
During Both this and Previous Pregnancy	1	0	1
Total	23	3	26

METHODS
(Out of 204 Patients)

Single Methods:	(Out of 174 Patients Number of Patients
Overdose or Ingestion of Poison	15
Tried to Drown Self	1
Slashed Wrists	3
Tried to Stab Self	1
Jumped from Fourth Floor Fire Escape	1
Tried to Jump from Window with Child in Her Arms	1
Running in Front of Cars	1
Multiple Methods:	
Overdose and Turned on Gas	1
Overdose and Attempt to Jump from Window	1
Slashed Wrists, Running in Front of Cars	1
Unspecified	1

TREATMENT

6 Patients were Hospitalized
1 Patient Treated in Emergency Room
Remainder Vomited, Treated Themselves, or Did Not Report Suicide Attempt to Anyone

EXHIBIT 147

Attempts by Patient or Another Person to Induce an Illegal Abortion During this Pregnancy

	Before Committee Abolished		After Committee Abolished		Total	
	No. pts.	% (of 20)	No. Pts.	% (of 174)	No. Pts.	% (of 378)
Attempt Admitted at Time of Interview	66	32.4	28	16.1	94	24.9
No Attempt Admitted at Time of Interview; Subsequently Obtained an Illegal Abortion	11	5.4	—	—	11	2.9
Total	77	37.7	28	16.1	105	27.8
	Number				% of Total Who Made Attempts	
Successful Attempts	13				12.4	

EXHIBIT 148

PATIENTS SUCCESSFULLY OBTAINING ILLEGAL ABORTION DURING THIS PREGNANCY

Person Inducing Abortion	Ethnic Group of Patient				Total Patients
	White	Black	P.R.	Other	
Physician	7	1	0	1	9
"Midwife"	0	1	2	0	3
Unknown	0	1	0	0	1
Total	7	3	2	1	13

Reason for Illegal Rather than Legal Abortion	Number of Patients
Patient panicky or impatient with application process	5
Minor, would not inform parents, could not be recommended	3
Insufficient psychiatric grounds, could not be recommended	2
Patient antagonized by house staff after abortion approved	1
Application rejected by committee	1
Patient schizophrenic, withdrew application. . . ? reason	1

EXHIBIT 150

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER
School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Gynecology
Family Planning Division

January 13, 1970

Re:

Therapeutic Abortion Committee
Bellevue Psychiatric Hospital
First Avenue and 27th Street
New York, N.Y. 10016

Gentlemen:

is a 37-year-old married woman referred for psychiatric evaluation by Dr. J. Kopelman. She is pregnant, her last menstrual period having occurred on November 10, 1969.

Mrs. has eight living children ranging in age from 2 to 19 years. A ninth child died in an accident three years ago. Her husband is a merchant seaman who is seldom at home. The family is beset by an overwhelming incidence of serious illness, both physical and emotional. The 19-year-old son is severely retarded and epileptic, and is unable to walk or speak. The 17-year-old son has been emotionally disturbed since age 4, beats his mother and younger siblings, and requires continual psychiatric treatment. The 6-year-old has a heart murmur, and the 5-year-old has a congenital cardiac condition which requires surgery. This child has had pneumonia numerous times. The 4-year-old is asthmatic, and the 2-year-old has bronchitis. Mrs. had tuberculosis in 1952 requiring surgery, and for the past year has been treated at Bellevue for a thyroid condition. She has been "nervous" and depressed all her life, and during one of

her admissions to the medical service here required transfer to the psychiatric hospital because of her "nerves." She is supposed to take tranquilizers but omits them because she takes "too many other pills." She required psychiatric treatment following the accidental death of one of her children 3 years ago.

On psychiatric examination the patient is worn-looking woman who appears much older than her 37 years. She weeps continually, and shows considerable psychomotor retardation. Her speech is logical and relevant. Her affect is constricted, and her mood is severely depressed. She has difficulty sleeping and dreams that she is drowning and that she is dead. She has thoughts of killing herself. In addition, she is somewhat paranoid, fears that she is followed on the street, and constantly checks her door as she is afraid someone will break in.

* * * *

psychiatric treatment and hospitalization in the past. She is overwhelmed by her children's and her own physical and emotional problems. Under the additional stress of an unwanted pregnancy she is becoming severely depressed and suicidal. Interruption of her pregnancy is therefore strongly recommended.

Very truly yours,

JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

EXHIBIT 151

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER
School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Genecology
Family Planning Division

February 11, 1970

Re:

Therapeutic Abortion Committee
Bellevue Hospital Center
First Avenue and 27th Street
New York, N.Y. 10016

Gentlemen:

is a 19-year-old unmarried girl referred for psychiatric evaluation regarding a possible therpeutic abortion by Dr. Victoria Sears of the Nassau County Drug Abuse and Addiction Commission. She is 16 to 18 weeks pregnant.

has an extraordinarily traumatic life history. She was sexually molested by her father from age 12 on, tacitly encouraged by her psychotic mother who outwardly denied knowledge of their relationship. At age 16 she became pregnant, but not one detected it. She delivered the baby alone in a bathroom at home and threw the fetus in the garbage. She does not know whether it was alive or not. Immediately afterwards she began "shooting" heroin in an attempt to obliterate her unbearable guilt and depression. For a week she believed the baby was still in the basement. She continued to use heroin whenever she felt depressed and whenever her father forced her to have intercourse with him. When she finally told her mother about her father's behavior, her mother blamed her. She eventually was arrested because of her drug use, and her mother refused to put up

bail. At her own request she was sent to Topic House, a residential treatment center for addicts, despite the fact that she has never been addicted. She has improved sufficiently in treatment to start college and work part-time. Since she has become pregnant, she has begun to decompensate, is unable to concentrate on her work, cannot eat or sleep, and has terrifying nightmares.

On psychiatric examination the patient is an articulate, attractive young woman who appears extremely depressed. Her pregnancy has exacerbated her severe guilt and self-hatred, and she is thinking of killing herself with an overdose of heroin. She is also thinking of aborting herself with a hanger. She feels as if she is living in a nightmare, and is afraid she will "explode."

In summary, this patient has been seriously depressed and self-destructive in the past. She is reacting to her unwanted pregnancy with severe depression, self-condemnation, and suicidal ideation. Interruption of her pregnancy is therefore urgently advised.

Very truly yours,

JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

EXHIBIT 152

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER
School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Gynecology
Family Planning Division

November 13, 1969
Re:
New York, N.Y.
Neighbor's Telephone (" - ")

Therapeutic Abortion Committee
Bellevue Hospital Center
First Avenue and 27th Street
New York, N.Y. 10016

Gentlemen:

is a 25-year-old unmarried woman referred for psychiatric evaluation by Dr. because of depression and self-destructive behavior. She is pregnant, her last menstrual period having occurred on August 25th.

Miss has a history of serious psychiatric disturbance. She has had two admissions to Bellevue Psychiatric Hospital for suicide attempts. In July 1964 she cut her wrists and turned on the gas in her apartment. In 1965 she felt depressed and attempted to drown herself in the East River. At age 12 she discovered that her mother had been stabbed in the neck, and since that time has been terrified by the sight of blood. She becomes nervous and frightened when she menstruates, and has refused transfusions because of her morbid fear.

Miss has a 9-month-old daughter toward whom she feels extremely ambivalent. She becomes irritated when the baby cries, and does "bad things" to her such as tying a rag around her mouth to muffle her crying. She has not taken the baby to pediatric clinic for many months. Since learning of her pregnancy she has become increasingly depressed and agitated. She has difficulty sleeping, and has recurrent nightmares of her mother being stabbed. She has unsuccessfully tried to abort herself by ingesting LSD, turpentine and kerosene, and by packing her vagina with aspirin tablets.

On psychiatric examination the patient is cooperative, but appears dreamy and detached. Her affect is extremely flat, except when she relate her mother's stabbing and weeps uncontrollably. Her mood is depressed. Her speech is often irrelevant and circumstantial, and her thinking is paralogical. She intends to abort herself by any means, despite the risk to her life that this involves. She is impulsive and grossly lacking in judgement and insight.

In summary, this is a chronic schizophrenic woman who has been hospitalized for two previous suicide attempts. She is reacting to her unwanted pregnancy with seriously self-destructive behavior and physical abuse of her 9-month-old infant. A therapeutic abortion is therefore urgently advised.

Very truly yours,

JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

JE:kk

EXHIBIT 156

May 6, 1969

Therapeutic Abortion Committee
Bellevue Hospital
First Avenue & 30th St.
New York, New York 10016

Re:
Age:
New York, N.Y.

Gentlemen:

is a twenty-three-year-old Puerto Rican housewife referred to me by the Family Planning Clinic for psychiatric evaluation after she was found to be two months pregnant. Mrs. lives with her husband, four children, and her seventy-two-year-old grandmother in a small crowded apartment. Her children include a four-year-old son who is asthmatic, a three-year-old daughter (whose twin died at birth), and one-year-old twin daughters. Her husband earns $60 per week, and this is supplemented by Welfare. Mrs. had been taking Enouid for contraceptive purposes. She states that she had forgotten to take a pill once in March, then resumed taking them but failed to menstruate after that. Her last menstrual period was February 19th. The patient is retarded, has a very vague sense of time, gives inaccurate dates, and probably missed more than one pill during a cycle.

Mrs. states she has been "nervous" since childhood, always fought with her brothers and "broke everything in the house". At age twelve, her mother took her to Court for setting fire to the curtains in their apartment. She says she set the fire because her mother and brothers were "bothering" her. The Court sent her to Wassaic, and her mother subsequently told her she was retarded. Mrs. has always felt rejected by her mother who refuses to help her take care of the children. Her seventy-two-year-old grandmother can help her only to a limited extent.

Mrs. still feels very "nervous". She finds it impossible to cope with the children and do her household chores. She often feels the children are too much for her, fears they will fall out of the window or otherwise hurt themselves.

She has been unable to take them to clinic regularly. When they are troublesome or noisey she beats them with her hands, shoes a frying pan, or other objects because "I can't control myself". She knocked her four-year-old daughter unconscious on one occasion, and beat her son so badly that her husband threatened to take the children away from her. Recently she has been leaving the home when she feels "nervous", and once left the children unsupervised for several hours. Sometimes she thinks of setting fire to the house and tells her husband he will find her and the children "burned up". She is unwilling to have another child and has told her husband she will kill herself if she has to have the baby. She went up to the roof with the intention of jumping off, but her husband and grandmother persuaded her to come down.

On psychiatric examination Mrs. is an obese woman who relates in a rather child-like manner. She appears anxious and often smiles inappropriately. Her speech is coherent, logical and relevant. Affect is labile, and she weeps easily. Her mood is depressed. She expresses suicidal and homicidal ideation, as described above. She has had difficulty sleeping and has recurrent nightmares in which people turn into animals or monsters and cut her with knives. She has some paranoid ideation in that she is afraid people follow her on the street and constantly looks back over her shoulders. She has no organized delusions or hallucinations. Clinically, Mrs. appears to be of very limited intelligence. Her sense of time is vague, and her memory for past events and dates is poor. She lacks insight and her judgment is poor.

In summary, this is a retarded woman who has been unable to manage her responsibilities at home, who is overburdened by four young children, crowded living conditions and numerous financial worries. She has extremely poor impulse control, and has reacted to frustration by lashing out at her children in a most destructive manner. The added burden of pregnancy further decreased her ability to manage at home, and has created a signfiicant risk of suicide and/or homicide. For these reasons, termination of her pregnancy by a therapeutic abortion is strongly advised.

Very truly yours,

JUDITH E. BELSKY, M.D.
Staff Psychiatrist

JEB:jah

EXHIBIT 159 (1)

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER
School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Gynecology
Family Planning Division

March 16, 1970
Re:
Chart
Husband:
Tel at work:

Therapeutic Abortion Committee
Bellevue Hospital Center

Gentlemen:

is a 22-year-old married Indian woman from British Guiana referred for psychiatric evaluation by the Bellevue Prenatal Clinic because of severe depression, irrational behavior and hyperemesis. She is about 8 weeks pregnant.

Mrs. has been maried for five years and has two children aged 3½ years and 9 months. During her second pregnancy she had hyperemesis necessitating hospitalization, but apparently unaccompanied by severe psychiatric symptoms. She believes that this pregnancy resulted from rape, and it seems likely that this belief is delusional. She states that during December she fainted at work and was brought home by a man whom she believes raped her while she was unconscious. Her last menstrual period was in January. Since she has been aware of her pregnancy she has had persistent vomiting resulting in a weight loss of 18 pounds. She has been

unable to sleep because of a feeling that she is choking. When she does sleep she has nightmares of killing a man and being strangled by a man. She is unable to take care of her infant's most fundamental needs such as feeding and bathing. Recently she has been physically assaulting both her husband and the child for no apparent reason, and her husband states that she appears "confused" during these attacks.

On psychiatric examination the patient is a thin, dazed-looking woman who appears as if she is physically on the verge of collapse. Her voice is low and monotonous, and her speech is often illogical. Her affect is constricted and her mood is severely depressed. She believes she is going to die, pleads for help, and states she will poison herself if she has to continue her pregnancy. She thinks that her husband will die if he discovers she is "carrying someone else's child." She has been having auditory hallucinations, hearing women's voices calling her, and when she closes her eyes she sees nude woman. Her physical and mental condition necessitated her admission to the hospital at the time of this interview.

In summary, this is a paranoid schizophrenic woman who has become acutely psychotic, suicidal and assaultive in response to her pregnancy. A therapeutic abortion is therefore urgently advised.

Very truly yours,

JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

I have interviewed the patient, agree with the above evaluation and concur in the recommendation for termination of pregnancy.

/s/ [Illegible]

/s/ Lawrence Shaderowfsky MD

EXHIBIT 159 (7)

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER

School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Gynecology
Family Planning Division

April 1, 1970

Therapeutic Abortion Committee
Bellevue Hospital Center

Gentlemen:

is a 26-year-old widow referred by the Clergymen's Committee for psychiatric evaluation regarding a possible therapeutic abortion. She is about two months pregnant despite her use of contraceptive foam.

Mrs. is pregnant by her husband who was murdered a month ago. She has 3 living children aged 9, 8 and 4 years. One child died a "crib death" at two months of age. The patient has had toxemia during each of her pregnancies, and is presently hypertensive with blood pressure readings of 180/100. She has eye ground changes and edema, and has been told that she will require prolonged hospitalization during this pregnancy. Since she has known of her pregnancy she has had severe nausea, vomiting, headaches and dizziness. She has become severely depressed and nervous, has insomnina and frequent crying spells. Her physician has prescribed phenobarbital, Librium and Doriden for her.

On psychiatric examination the patient attempts to control herself but eventually bursts into tears. She sees no future for herself or her children if she has this child, and intends to kill herself with an overdose of tranquil-

izers and sleeping pills if she cannot obtain an abortion. Her judgment at this time is seriously impaired.

In summary, this woman has recently lost her husband through murder. The prospect of continuing a difficult and unwanted pregnancy under these circumstances is so overwhelming to her that she has become severely depressed and suicidal. Interruption of her pregnancy is therefore urgently recommended.

Very truly yours,

/s/ Judith E. Belsky
JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

I have interviewed the patient, agree with the above evaluation and concur in the recommendation for termination of pregnancy.

PAULINE RUDNICK, M.D.

EXHIBIT 159(x)

[SEAL]

NEW YORK UNIVERSITY MEDICAL CENTER

School of Medicine
550 First Avenue, New York, N.Y. 10016
Area 212 679-3200
CABLE ADDRESS: NYUMEDIC

Department of Obstetrics and Gynecology
Family Planning Division

November 17, 1969

Re:

New York, N.Y.
Neighbor's telephone:

Therapeutic Abortion Committee
Bellevue Hospital Center
First Avenue and 27th Street
New York, N.Y. 10016

Gentlemen:

is a 26-year-old divorcee referred for psychiatric evaluation because of agitation and suicidal ideation. She is pregnant, her last menstrual period having occurred on September 6th.

life has been marked by overwhelming tragedy and medical and psychiatric illness. Her mother died when she was an infant, and her father committed suicide when she was 6 years old. She spent part of her childhood with a foster mother who brutally mistreated her, severing her finger with a scissors. The remainder of her childhood was spent in an orphange. She married a 57-year-old man when she was 20, and left him two years ago because of severe marital and emotional difficulties. She has suffered for several years from recurrent renal infections and a bleeding disorder, which possibly has a genetic basis. She has used amphetamine intermittently since she was in high school, and has had several episodes of severe agitated depression. In 1964 she was admitted to Bellevue Psychiatric Hospital during one of these episodes. She was followed for a short time in the Mental Hygiene Clinic, but subsequently moved to New Jersey where she had to be hospitalized for an overdose of meprobamate. She has gone for long periods without eating adequately, and has suffered from malnutrition.

Since she has been pregnant, the patient has become increasingly depressed and agitated. She has frequent crying spells, sleeps poorly, and awakens screaming from recurrent nightmares. She also has nausea, vomiting and dizzy spells. She recently attempted to abort herself by taking large amounts of orgotrate, quinine and Thalidomide, which she obtained from a friend.

On psychiatric examination, the patient is tense and anxious. She weeps uncontrollable at times. Her speech is logical and relevant. Her affect is constricted, and her mood very depressed. She often thinks of killing herself by taking an overdose of pills or jumping out of the window. She is severely phobic, and is afraid to walk into the psychiatric hospital unaccompanied because of the mice and roaches. The patient also has feelings of depersonalization and unreality. She is impulsive, and her judgment is considerable impaired.

In brief, this is a chronically disturbed woman who is reacting to her unwanted pregnancy with severe agitated depression, suicidal ideation, and seriously self-destructive behavior. She has taken Thalidomide during her early pregnancy. A therapeutic abortion is therefore strongly recommended on both psychiatric and engenic grounds.

Very truly yours,

JUDITH E. BELSKY, M.D.
Assistant Clinical Psychiatrist

JEB:kk

EXHIBIT 169

AMERICAN ACADEMY OF CHILD PSYCHIATRY
1800 R Street, N.W., Suite 904
Washington, D.C. 20009
Area Code 202-462-3754

November 2, 1977

FOR YOUR INFORMATION

The Council of the American Academy of Child Psychiatry unanimously endorsed the enclosed position statement on Medicaid funding for abortion for women under the age of 16 because of its effects on the mental health of the mother and the unplanned child. We ask that it be disseminated to both the press and legislative bodies.

The AACP, composed of 1896 medically certified specialists in child psychiatry, also represent 28 affiliated regional associations of child psychiatrists in the United States.

We ask that this statement be given your earnest consideration for publication.

FOR FURTHER INFORMATION CONTACT:

1) Virginia Q. Bausch, Executive Director
American Academy of Child Psychiatry
1800 R Street, N.W.
Washington, D.C. 20009 (202) 462-3754

2) Maurice R. Friend, M.D., Chairman Public Information Comm.
262 Central Park West
New York, New York 10024 (12) EN 2-7541

NEWS RELEASE *RE: ABORTION*

TWENTY FOURTH ANNUAL MEETING
OCTOBER 19-23, 1977
AMERICAN ACADEMY OF CHILD PSYCHIATRY
SUITE 904, 1800 R STREET, N.W.
WASHINGTON, D.C. 20009
(202) 462-3754

HOUSTON, TEXAS OCTOBER—1977

The American Academy of Child Psychiatry is aware of the national debate concerning the funding of abortion by the Medicaid system. The Academy wishes to declare that there is now a body of scientific data which confirms:

1) that the young adolescent most vulnerable to early pregnancy is the product of adverse sociocultural conditions involving poverty, discrimination, family disorganization and the like.

2) that the resulting pregnancy is statistically laden with medical complications that threaten the well being of both mother and fetus;

3) that the delivery that ensues is prone to prematurity and major threats to the health of both mother and child;

4) that the resulting newborns have a higher percentage of birth defects, developmental difficulties and a poorer life and health expectancy than the average for our society.

5) that such children are often not given up for adoption and eventually get caught in the web of the foster care and welfare systems where they enter a lifetime of dependency and expensive social interventions.

6) that these children are often unwanted and in a short time become prone to abuse, neglect, failure to thrive, and serious medical illness.

7) that the tendency of this pattern to pass from generation to generation is very marked and thus serves to perpetuate a cycle of social and educational failure, mental and physical illness, and serious delinquency and

8) that the freedom to act to interrupt this cycle must be considered a mental health imperative with major social implications.

As a result of these data, it is urgently recommended that elective abortion for teenage pregnancy be adequately funded within the Medicaid System.

FOR FURTHER INFORMATION CONTACT:

1) Virginia Q. Bausch, Executive Director
American Academy of Child Psychiatry
(202) 462-3754
1800 R Street, N.W., Washington, D.C. 20009

2) Maurice R. Friend, M.D., Chairman, Public Information Comm.
262 Central Park West
New York, New York 10024 (212) EN 2-7541

EXHIBIT 177

Analysis of DHEW Table, "Average Monthly Number of Abortions Under XIX," 6/7/78 Revision

States Adopting FY 1978 Hyde Language *

	1976 Estimated Monthly Average No. of Abortions (per AGI)	Fy 1977 Monthly Average No. of Abortions (per DHEW)	Pre Hyde II 6.33 Months 8/4/77 to 2/13/78 Monthly Average No. of Abortions (per DHEW)	Post Hyde II 3.75 Months 2/14/78 to 6/6/78 Monthly Average No. of Abortions (per DHEW)	Percent Change— FY 1977 to Post Hyde II (2-4÷2)
	(1)	(2)	(3)	(4)	(5)
Alabama	108	84	0	0	—100%
Arkansas	42	53	0.2	1.1	—97.9%
Maine	42	29	0.5	0	—100%
Montana	58	38	0	0	—100%
Nevada	31**	33	0	0	—100%
Oklahoma	58	52	2.4	0.3	—99.4%
South Carolina	42**	85	1.1	1.9	—97.8%
Texas	317**	257	4.3	1.9	—99.3%
Total	698	631	8.5	5.2	—99.2%

* Delaware, Geordgia, Indiana, Mississippi and Vermont also adopted the FY 1978 Hyde language, but DHEW data are not available for these states.

** includes Title XIX-funded abortions only, excluding Title XX.

States with "Life Endangerment" Language Only *

	1976 Estimated Monthly Average No. of Abortions (per AGI)	Fy 1977 Monthly Average No. of Abortions (per DHEW)	Pre Hyde II 6.33 Months 8/4/77 to 2/13/78 Monthly Average No. of Abortions (per DHEW)	Post Hyde II 3.75 Months 2/14/78 to 6/8/78 Monthly Average No. of Abortions (per DHEW)	Percent Change— FY 1977 to Post Hyde II (2-4÷2)
	(1)	(2)	(3)	(4)	(5)
Connecticut	167	145	49.2	8.3	—94.3%
Florida	133	361	9.3	7.7	—97.9%
Kansas	308	251	121.6	6.7	—97.3%
New Hampshire	17	17	1.1	0	—100%
Utah	25	16	3.6	2.7	—83.1%
Total	650	790	184.8	25.4	—96.8%

* Louisiana, Ohio and Tennessee also adopted "life endangerment" language, but DHEW data are not available for these states.

290

States with "Preserve Life" Language Only *

	1976 Estimated Monthly Average No. of Abortions (per AGI)	Fy 1977 Monthly Average No. of Abortions (per DHEW)	Pre Hyde II 6.33 Months 8/4/77 to 2/13/78 Monthly Average No. of Abortions (per DHEW)	Post Hyde II 3.75 Months 2/14/78 to 6/6/78 Monthly Average No. of Abortions (per DHEW)	Percent Change— FY 1977 to Post Hyde II (2-4÷2)
	(1)	(2)	(3)	(4)	(5)
Kentucky	75	155	1.7	NA	—98.9%+
Missouri	200	206	0	0	—100%
New Jersey	833	1,150	20.5	18.7	—98.4%
Rhode Island	83	58	0.3	0	—100%
South Dakota	NA	0	0	0.3	—
Total	1,191	1,569	22.5	19.0	—98.8%

* North Dakota has also adopted "preserve life" lanugage, but DHEW data are not available for this state.

+ Percent change from FY 1977 to Pre Hyde II.

NA Data are not available.

291

States with "Life Endangerment, Rape and Incest" Lanugage *

	1976 Estimated Monthly Average No. of Abortions (per AGI)	Fy 1977 Monthly Average No. of Abortions (per DHEW)	Pre Hyde II 6.33 Months 8/4/77 to 2/13/78 Monthly Average No. of Abortions (per DHEW)	Post Hyde II 3.75 Months 2/14/78 to 6/6/78 Monthly Average No. of Abortions (per DHEW)	Percent Change— FY 1977 to Post Hyde II (2-4÷2)
	(1)	(2)	(3)	(4)	(5)
Minnesota	108	160	35.9	0	—100%
Nebraska	25	43	0	0	—100%
New Mexico	42	43	27.4	4.8	—88.8%
Wyoming	8	5	0	0	—100%
Total	183	251	63.3	4.8	—98.1%

* Wisconsin also adopted "life endangerment, rape and incest" language, but DHEW data are not available for this state.

Analysis of DHEW Table, "Number of Abortions, Post Hyde II, 2/14/78—Present, 3-3/4 mos.," 6/7/78 Revision

States Adopting FY 1978 Hyde Lanugage *

	No. of Abortions Certified Post Hyde II, 2/14/78 to 6/7/78 (3.75 mos.) per DHEW)	Reason of Acceptance (per DHEW)			FY 1977 Average Monthly No. of Abortions (per DHEW) X 3.75 Months
		Endanger Mother's Life	Long Lasting Damage	Rape or Incest Victim	
Alabama	0	0	0	0	315.0
Arkansas	4	1	2	1	198.7
Maine	0	0	0	0	108.7
Mississippi	12	11	0	1	NA
Montana	0	0	0	0	142.5
Nevada	0	0	0	0	123.7
Oklahoma	1	0	1	0	195.0
South Carolina	7	6	0	1	318.7
Texas	7	0	0	7	963.7
Total number	31	18	3	10	2,366.3
Total percent	100.0%	58.1%	9.7%	32.2%	

Note: Change from FY 1977 (2,366.3) to Post Hyde II (31):—98.7%.

* Georgia, Delaware and Vermont also adopted the FY 1978 Hyde language, but DHEW data are not available for these states.

NA data are not available.

EXHIBIT 240

PROJECTION OF EXCESS MORTALITY

If Term Births are Substituted for Legal Abortions

If all pregnant women who would have sought Medicaid funds for abortion carried their pregnancy to term, there would be deaths in excess of the current number because of the relatively greater risks of pregnancy and childbirth. Because legal abortion is safer than childbearing (*6*), and because those women whose abortions have been publicly funded have a racial distribution which puts them at a higher risk of material mortality than the general population, this seemingly innocuous alternative to abortion results in a sizeable number of excess deaths to women of childbearing age.

In 1974, the risk of mortality from pregnancy and childbearing was 10.0 deaths per 100,000 live births in white women and 35.1 deaths per 100,000 live births from women of black-and-other races (*5*). The mortality ratio for abortion in 1974 was 0.5 deaths per 100,000 abortions for white women and 2.4 deaths per 100,000 abortions for black-and-other women. Thus, the risk of death from pregnancy and childbirth excluding abortion —the attributable mortality risk—is 9.5 per 100,000 live births for white women and 32.7 per 100,000 live births for women of black-and-other races. Applying the attributable mortality risk to the number of pregnancies for women who would have sought a Medicaid funded abortion, we project 15 excess deaths among white women and 29 excess deaths among women of black-and-other races (Table 1). The total number of excess deaths is 44.

If Nonlegal Abortions are Substituted for Legal Abortions

We estimate that excess deaths for women of childbearing age will also occur if pregnant women obtain abortions induced by persons other than physicians. Tietze estimates that the mortality rate of nonlegal abortion in developed countries is 40 per 100,000 procedures (*7*). The death-to-case rate for legal abortion is about

4 per 100,000 abortion (*6*) for an attributable mortality risk of 36 deaths from every 100,000 nonlegal abortions. If all 250,000 women who would have obtained a legal abortion terminated their pregnancies through nonlegal channels, then 90 excess deaths would result.

However, it is unlikely that every woman would choose a nonlegal abortion; some would carry the pregnancy to term. Tietze further estimated that 70% of current legal abortions replaced nonlegal and self-induced abortions (*8*). If 70% of the 250,000 pregnant women who would have had a Medicaid funded abortion have a nonlegal abortion, we estimate that 63 excess deaths would occur. The remaining 30% who carry the pregnancy to term are subject to increased risk of childbearing. Applying the relevant mortality ratios by race to the remaining 30% of women seeking Medicaid funded abortions, 14 additional deaths are projected. Thus, we calculate a total of 77 excess deaths to women of reproductive age if previous proportions of nonlegal abortion were substituted for legal abortion.

Delay in Obtaining Legal Abortions

Because even legal abortion becomes more risky the later in pregnancy it is performed (*6*), any delay in obtaining an abortion would result in excess mortality risks. Assuming Medicaid funded abortions have the same distribution by gestational age as non-Medicaid funded abortions, we can project the number of Medicaid funded abortions by gestational age (Table 2). If difficulty in obtaining funds for abortion resulted in an average delay of *only two weeks* for each legal abortion among these women, 5 excess deaths would have occurred (Table 2). While 5 deaths does not seem like a large number, it would have increased the death-to-case rate for women eventually having abortions with public funds by nearly 60%, and raised the overall national abortion death-to-case rate by 21%. The impact of early decision-making and prompt financial accessability to abortion services on minimizing abortion mortality should be stressed.

CONCLUSION

The most important principle of this analysis is that once pregnant, a woman encounters an increased risk of death, no matter what her choice of outcomes. While the risks of pregnancy and childbirth are readily assumed in the case of wanted pregnancy, unfortunately not all pregnancies are wanted. For unwanted pregnancies, legal abortion in the first-trimester is the safest option available to women.

The actual impact of non-funding would depend on the number of women seeking Medicaid funds for abortion, on the proportion choosing to carry the pregnancy to term, on those choosing a nonlegal abortion, and on the delay encountered in obtaining other funding sources. If publicly funded abortions were restricted, we have calculated that from 5 to 90 excess deaths would result for women of childbearing age in the United States depending on the distribution of the above options chosen by pregnant women whose public funding has been denied. Thus, any permutation or combination of the various alternatives presented above would result in a predictable level of deaths in excess of the current level to pregnant women seeking abortion who must rely on public funding for medical care.

EXHIBIT 248

CONCERNS

1. I am not privy to all of the potential program tradeoffs to be made, or perhaps being made, in the budget process. It is clear to me, however, from information regarding PHS program funding intentions (Attachment 3) that *at least a possibility exists whereby the attention to the teenage pregnancy population may up-stage that portion of the abortion-desiring constituency which is not teenage.*

Petitioners for abortions subsidized by this department have perhaps more differences than similarities when examined regarding reasons for seeking an abortion. The broadest safe generalizations divide them into a minimum of two categories:

Teenage

A. Health Problems

- High maternal mortality rate especially for teenagers under fifteen
- Complications of pregnancy include:
  - —High occurrence of toxemia (blood poisoning) and anemia
  - —High occurrence of contracted pelvis thereby inhibiting physical growth
  - —High occurrence of preeclampsia (convulsions)
  - —High occurrence of prolonged and premature labor
- High infant mortality
  - —Greatest risk in very young mothers
  - —Greatest risk in second and higher order births
- Low birth weight infants are twice as high among teenagers under fifteen than for all pregnant women

  Low birth weight is correlated with:

  —cerebral palsy

  —epilepsy

  —mental retardation

- High Childhood (1 year old and older) mortality
- High psychological stress for young women who become pregnant

B. Social Concerns

- Higher school dropout rate for pregnant female adolescents
- Low employment and earning level throughout life
- Increased fertility, including high incidence of unwanted births
- Family stress

  —divorce

  —intrafamily violence, especially child abuse

  —suicide

20-45 Years

- Defects or handicaps among previous/live births
- Already acquired maximum children for whom there can be an economic responsibility
- Already acquired maximum children for whom there can be an emotional responsibility
- Already acquired maximum children for whom there can be a physical responsibility
- To avoid withdrawal from labor market and consequent public dependency
- To avoid withdrawal from labor market which will deprive current dependent
- Household or family unit currently a state of flux with uncertainty that parent(s) would not have to default in responsibility to child if carried to term.
- Preservation of health either by spacing or limiting number of term pregnancies

Other sub-categorizations could be generalized on the basis of ethnicity, geography, marital status, education/income, urban/rural availability of support systems and services, age, labor market rewards/incentives, etc.

2. *Abortion is but one alternative solution to many of the "problems," reflected in the lists above, which may make a pregnancy unwise or unwanted particularly when related to the reasons of women in the 20-45 age category. It is an option, uniquely, which is exercised between conception and live birth. As such, the literal alternatives to it are suicide, motherhood, and, some would add, madness Consequently, there is some confusion, discomfort, and cynicism greeting efforts to "find" or "emphasize" or "identify" Alternatives to Abortions.*

EXHIBIT 455 A-D

REPRODUCTIVE SERVICES INC.
Human Fertility Planning

October 13, 1977

Associate Medical Director
National Health Ins.
7800 Shoal Creek Blvd.
Austin, Tx 78757

Attn: Dr. Perlman

Re:

Dear Dr. Perlman:

The above named patient was referred to me from Nacogdoches by her physician (letters enclosed) with the diagnosis of chronic glomerulonephritis.

I agree with the physician that a therapeutic abortion is necessary for the preservation of her life and health.

I am therefore requesting prior approval for a therapeutic abortion.

Your immediate response is appreciated.

Sincerely,

Dudley Powell, M.D.
Reproductive Services Inc.
2339 Inwood Rd. Suite 37
Dallas, Tx 75235

WILLIAM WAYNE HAIRSTON, D.O.
PHYSICIAN & SURGEON
932 University Drive Nacogdoches, Texas 75061

10-13-77

To whom it may concern:

[Name deleted] is a 15 year old girl who is about 9-10 weeks pregnant by date her LMP was 1st week in August but she really feels 1-2 weeks further along. She has chronic glomerulonephritis & it has been recommended by her & her parents that a *therapeutic abortion* be performed to avoid complications of her disease. She is normotensive & her renal function studies are well at this time. P. E. really unremarkable.

/s/ Williaam Wayne Hairston, D.O.
WILLIAM WAYNE HAIRSTON, D.O.

WILLIAM WAYNE HAIRSTON, D.O.
PHYSICIAN & SURGEON
932 University Drive Nacogdoches, Texas 75061

10-17-77

To whom it may concern:

This letter accompanies a previous letter I have written about [Name Deleted]. Let me reemphasize that I do believe an abortion is necessary and that pregnancy carried to term could be life threatening in the face of her history of chronic glomerulonephritis.

/s/ Williaam Wayne Hairston, D.O.
WILLIAM WAYNE HAIRSTON, D.O.

NATIONAL HEALTH INSURANCE COMPANY
Austin, Texas 78757
Exchange Park, 7800 Shoal Creek Blvd., (512) 458-5111

October 20, 1977

Dudley Powell, M.D.
Reproductive Services, Inc.
2339 Inwood Rd. Suite 37
Dallas, Texas 75235

Re:

Dear Dr. Powell:

Your request for abortion for the above named recipient has been denied. The recipient's condition described in your letter of October 18, 1977, does not fall within the established medical guidelines for therapeutic abortion under the Medicaid Program. These guidelines include only those conditions which would endanger the mother's life if the fetus were carried to term.

Sincerely,

/s/ Jack M. Perlman, M.D.
JACK M. PERLMAN, M.D.
Associate Medical Director

JMP:11d

Defendants' Exhibit H

Classification and Preventabiilty

Maternal deaths have been classified according to The American College of Obstetricians and Gynecologists' publication, *Ostetric-Gynecologic Terminology.*

A *direct maternal death* is an obstetric death resulting from obstetric complications of the pregnancy state, labor, or puerperium—from interventions, omissions, incorrect treatment, or a chain of events resulting from any of the above. *Indirect maternal death* is an obstetric death resulting from previously existing disease, or disease that developed during pregnancy, labor, or the puerperium; it is not directly due to obstetric causes, but aggravated by the physiologic effects of pregnancy. *Nonmaternal death* is an obstetric death resulting from accidental or incidental causes not related to the pregnancy or its management.

For the years 1970-1976, a total of 149 maternal deaths with complete case reports have been classified as follows:

Direct Maternal Death	69.1%
Indirect Maternal Death	25.5%
Nonmaternal Death	5.4%

Hypertensive States of Pregnancy

There are certain vascular derangements that either antedate or arise in pregnancy or the early puerperium that have been designated as the toxemias of pregnancy, EPH (edema, proteinuria, hypertension) complex, gestosis, and other terms. These generic terms have grouped together several conditions that have been characterized by hypertension sometimes associated with proteinuria, edema, convulsions, coma, and other signs. Because these terms have been all-inclusive, discrepancies in statistical reporting have occurred. The Committee on Terminology of The American College of Obstetricians and Gynecologists discourages the use of term "toxemia" and suggests these conditions be classified as hypertensive states of pregnancy.

Preeclampsia and eclampsia, categorized under hypertensive states of pregnancy, constitute one of the leading causes of maternal death and contribute significantly to perinatal mortality. The incidence of these conditions, not only nationally but also in New York State, has steadily declined during this century and the associated maternal mortality has fallen markedly with a resultant low proportion of the total maternal deaths attributed to these conditions. However, an increase in preeclampsia-eclampsia in New York State has brought the percent of mortality up to 42.8 of all maternal deaths for the year 1976, the highest percent recorded since 1970.

Of the total case reports received during the study period, 13 maternal deaths have been classified in the category, hypertensive states of pregnancy: five cases were diagnosed as preeclampsia and eight as eclampsia, including one case of postpartum eclampsia.

There is common agreement that mortality due to hypertensive states of pregnancy is generally preventable, and all cases in this series have been so classified based on currently accepted definitions for preventability. Autopsy reports were submitted for 61.5% of these cases.

Preeclampsia and eclampsia, according to the texts, most often affect primigravidas, with susceptibility highest at each end of the age scale. However, in this study, the condition of preeclampsia occurred almost exclusively in the 20-29 year age group (80%) with the only exception reported at age 38. Eighty percent of the preeclamptic cases were multiparas, asmight be expected with the majority at age 25 or over.

In the eclamptic group, the pattern is a more classic one, with the greatest concentration of cases occurring in patients 19 years of age or younger and in those 30 years and older. Of the eight eclampsia cases, four were primigravidas, three of whom reported age at 19 years or less.

The incidence of preeclampsia-eclampsia is known to be increased in patients with chronic cardiovascular renal disease, diabetes mellitus, severe anemia, or a familial

history of eclampsia or preeclampsia. Of 11 patients with complete case reports, eight were found to have non-contributory past medical histories. The remaining three had significant past histories reported as: Class A diabetes and anemia; chronic renal disease; and previous surgical removal of renal calculi followed by recurrent episodes.

Hypertensive states of pregnancy occur after the 20th week of gestation with the eclamptogenic process usually appearing later than the 25th week. In this series of cases, five women first developed symptoms during the second trimester, six during the third trimester, and two cases did not report this information. In all instances, symptoms first appeared beyond the 23rd week of gestation. Following the appearance of symptoms, and up until the time of hospital admission, seven patients received no therapy for these conditions while the records of four patients indicate therapy had been prescribed. In the untreated cases, the time period from onset of symptoms until date of hospital admission ranged from 24 hours to 12 weeks.

According to the texts, the most frequent causes of maternal mortality in preeclampsia and eclampsia are congestive heart failure, cerebral hemorrhage, and the complications of operative obstetrics. In this study, cerebrovascular accidents and pulmonary edema were reported to be the mechanism of death in 30.8% and 23.1% of the cases, respectively, followed by heart failure (15.4%), respiratory infection (15.4%), pulmonary embolism (7.7%), and renal disease (7.7%).

PLAINTIFF'S EXHIBIT 36

A CALL TO CONCERN

The increasing urgency of the issue of abortion rights requires us as teachers and writers of religious ethics to speak out.

* * * * *

1. The most compelling argument against the inflexibility of the absolutist position is its cost in human misery. The absolutist position does not concern itself about the quality of the entire life cycle, the health and well-being of the mother and family, the question of emotional and economic resources, the cases of extreme deformity. Its total preoccupation with the status of the unborn renders it blind to the well-being and freedom of choice of persons in community.
2. "Pro-life" must not be limited to concern for the unborn; it must also include a concern for the quality of life as a whole. The affirmation of life in Judeo-Christian ethics requires a commitment to make life healthy and whole from beginning to end. Considering the best medical advice, the best moral insight, and a concern for the total quality of the whole life for the born and the unborn, we believe that abortion may in some instances be the most loving act possible.
3. We believe it is wrong to deny Medicaid assistance to poor women seeking abortions. This denial makes it difficult for those who need it most to exercise a legal right, and it implies public censure of a form of medical service which in fact has the moral support of major religious groups.
4. We are saddened by the heavy institutional involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into law, and we view this as a serious threat to religious liberty and freedom of conscience. We acknowledge the legal right of all individuals and groups, both religious and secular, to seek laws that reflect their religious and ethical beliefs. But the institutional mobilization of Roman Catholic dioceses, including massive

financial contributions by those dioceses to the National Committee for a Human Life Amendment, is inappropriate on this issue. If successful, it would violate the deeply held religious convictions of individual members and official bodies of many other religious groups about when human personhood begins, the relative rights of a woman and a fetus, and responsible family life. This is particularly a problem when there is no clear majority opinion on these fundamental issues nor an adequate social base of consensus for legitimate and enforceable legislation.

5. We call upon the leaders of religious groups supporting abortion rights to speak out more clearly and publicly in response to the dangerously increasing influence of the absolutist position. There may be some ecumenical risks in such candor, but those risks have already been assumed by those who have pressed the absolutist position on religious grounds. In the long run, the true test of ecumenical authenticity is the ability to sustain dialogue and friendship in spite of very sharp disagreements on matters of substance.

PLAINTIFFS' EXHIBIT 347

ABORTION IS MURDER

If you think God Failed to inform us as to when the soul enters into life, then speculate on the following passages from the Old Testament Jeremiah 1,5, "before I formed you in the womb I knew you, before you came to birth I consecreated you" Job 31, 15 "God shaped us all within our mother" Jeremiah and Job credited God with our creation in the womb. Eve also credits God in Genesis 4.2 "I have acquired a man with help of Yahweh" (GOD).

God does not credit human life that is not bound to eternity, therefore, the soul must be present at conception. To prove this we refer to David in the Old Testament who claimed he was A SINNER FROM THE MOMENT OF CONCEPTION. Psalms 51, 5.

* * * *

To be in sin indicates the presence of a soul. According to the New Testament, Jesus is concieved at once. He did not become Jesus, a week, a month, or many months later. He is Jesus at once. (you are you at once).

Mary the Mother of Jesus immediately goes to Elizabeth who is six months pregnant. Elizabeth rejoices in the presence of her Lord. Even though Mary is pregnant only a matter of days. In unmistaken terms the bible proves both Life and Soul present at (as David said) THE MOMENT OF CONCEPTION.

* * * *

Abortion is MURDER. The right to life comes directly from GOD.

Do not fight deformity by deforming your soul.

Poverty is no license to kill your son or daughter in the womb.

Doctors who perform abortions are paid Assassins.

* * * *

In the words of St. Paul, "You are not your own property. You have been bought and paid for. That is why

you should use your body for the Glory of God." Corin. 6,20.

It is, indeed, the very matter of life which is at stake. Medical science has informed us that at the moment of conception, there comes into being a unique human life in the microscopically tiny egg cell. Contained in this cell is the blueprint for the development of the whole human person, factors which will influence the temperment, physique, eye, hair and skin color, and even intellectual capacity. This cell's tissue composition is distinct from its mother's tissue and would be rejected from her body were it not to be enclosed in the amniotic sac.

The unborn child's civil rights have increasingly been recognized by the law. We recall, in particular, that case in which the mother was forced by the courts against her religious convictions to have a blood transfusion to maintain her baby's life. Likewise, the unborn child's rights of inheritance and medical or economic support, his right to recover damages for injury suffered in the womb are affirmed by the courts. In short, the law has cast itself in the role of safeguarding the rights of the unborn.

Law is an educator. If it allows the destruction of unwanted life, it unavoidably teaches that life is cheap.

* * * *

A final quote from Isaiah, "Woe to the legislators of infamous laws, to those who issue tyrannical decrees, who refuse justice to the unfortunate." Isaiah 10, 1.

HUMAN LIFE AMENDMENT GROUP
663 Fifth Avenue

P. Ex. 312A/*St. Louis Post Dispatch*,
Tuesday, January 27, 1976, page 1

...all of a St. Louis University warehouse. (Post-Dispatch Ph...
...ART" WORK WITH A MESSAGE: Anti-abortion sign on the wall of

PLAINTIFFS' EXHIBIT 462

SPEECH TO THE MARYLAND RIGHT TO LIFE BANQUET

by Henry Hyde

October 29, 1977

Your Excellency Bishop Stafford, Reverend Pastors, Reverend Clergy, my good friend Father Fiore who is also my constituent, distinguished ladies and gentlemen of the diocese and keepers of the flame.

* * * *

When I talk to groups such as your own I feel somewhat presumptuous because always in the group are doctors, clergy, volunteers and laymen who have been in this movement for many, many years and who know everything I know and know it much better.

* * * *

The issue is very important. The slaughter of the innocents. We have over 1 million homicides a year in this country all in the name of humanity and compassion, all in the blessed name of abortion. Herod must smile, if indeed he can smile wherever he is, when he looks at how technologically advanced we are in the slaughter of the innocents, something that he was—certainly a butcher but certainly inadequate compared to modern-day standards where it is done in antiseptic surroundings by doctors—men dressed as doctors who are masquerading as healers, but who have become executioners.

* * * *

I think so often of what Henry Adams said when he described the Cathredral at Chartes "It embodies the noblest aspirations of man, the reaching up for infinity." I think sometimes what our movement does is symbolically reaching up for that little bit of infinity. That is the soul of an unborn child.

* * * *

I think its your job and its my job as keepers of the flame to try to grab the bridle of that horse to pull it a little straighter, a little more forward towards the goal of total respect for the most defenseless, the most abstract in a physical way, the innocent, inconvenit unborn and if I may be permitted to say that when the time comes as it surely will when we face that very terrible moment, the final judgment, I've often thought as Fulton Sheen wrote that it is a terrible moment of loneliness you have no advocates there, you are there alone standing before God and a terror will rip your soul like nothing you can imagine. I really think that those in the pro-life movement will not be alone. I think there'll be a chorus of voices that have never been heard in this world but are heard very beautifully and very loudly in the next world and I think they will plead for everyone who has been in this movement and they will say to God, "Spare him, because he loved us." And God will look at us and say not "Did you succeed?" but "Did you try?".

PLAINTIFFS' EXHIBIT 368

March, 1979, THE YORKTOWNER

Say No to murder

To the Editor:

To all New York State taxpayers, who believe in the word of God.

We, George and Catherine Hannagan, taxpayers of the great state of New York, plead, beg with you all; take the time now to write to all the politicians in your various counties to take a stand and halt state funding of abortion.

You, the taxpayer, have the right to pursue with letters in flooding your representatives to use your tax dollars wisely. In our great state last year $8 million dollars were spent to abort unborn children.

By your non-involvement; these precious Holy Innocents of today's world are denied their God-given right to birth. They are destroyed and thrown away like a dirty old rag. Keep in mind, on judgement day, you will be held accountable! God, Our Father and Our Creator; only He creates and only He destroys.

You have the time to read this letter, you have the time to write to your assemblyman or assemblywoman and request that he or she co-sponsor this extremely important bill.

Assemblywoman Connelly is sponsoring Bill #A9091 in this session of the New York State Legislature.

Please write now, don't put it off, children are dying, all it takes is a little effort on your part to say No, to murder.

Under the protection of Mary, Our Blessed Mother.

Peace in Christ

George and Catherine Hannagan
Yorktown Heights

THE YORKTOWNER, Wednesday, March 22, 1978

Say "No" to murder—II

To the Editor:

How do George and Catherine Hannagan expect your readers to respond to their fervent appeal in *The Yorktowner* to, "write your assemblyman . . . to take a stand and halt state funding of abortion"? Such politicalizing in terms of, "the word of God," "precious Holy Innocents," "on judgement day you will be held accountable," and all blanketed "Under the protection of Mary, Our Blessed Mother," may sit uncomfortably with both Catholics and non-Catholics who believe in the separation of church and state.

I have no desire to affront the Hannagans' deep personal religious or philosophical convictions, even though their exercise of free speech to suggest pressures of hellfire and damnation against those who accept the people's laws expressed through the democratic process, seems—at least archaic.

And I do find their written appeal in fortunate contrast to uglier forms this new American zealotry is taking—in communities less civilized and perhaps more anonymous than Yorktown. Only last month, reports *The New York Times* of March 2:

"Someone posing as a delivery man and carrying a plastic bag walked into a clinic in Cleveland, and rushed down the hall to an operating room. The bag contained gasoline, which he splashed in the face of a technician. He then spread it around the room, set it afire, and fled. In an adjoining room, a woman was having an abortion. As flames swept into the room, and smoke rolled down the hallway, the woman leaped off the table and ran out. A counselor threw her a coat and she and 15 other patients, dressed in paper gowns, escaped."

The *Times* goes on to list similar arson/manslaughter and vandalism attempts during the past months by anti-abortion zealots against clinics and medical centers in Fairfax, Virginia, St. Paul, Minnesota, Columbus and Cincinnati, Ohio, Omaha, Nebraska and Burlington, Vermont.

Lincoln Diamant
Ossining

PLAINTIFFS' EXHIBIT 139

Baptists for Life Leaflet

BAPTISTS FOR LIFE

Founded to Manifest Christian Concern for
All Human Life, Whether Unborn,
Handicapped or Aged . . . . !

LOVE LIFE

DEFEND LIFE

RESPECT LIFE

> OUR CHRISTIAN CONCERN: ACTION . . .

Baptists, along with others, must speak out and resist the spread of the evils of abortion, infanticide, and euthanasia. To do so effectively, we must learn more about what is happening to these most helpless of God's children . . . and we must search for ways to help people afflicted with the problems that may lead them in desperation to break God's law. As private citizens, we can inform our elected representatives that we oppose any further enactment of laws that will allow human life to be taken for the sake of convenience. And we can urge the passage of an Amendment to the U.S. Constitution that will restore the once-inalienable right to life to all human beings.

PLAINTIFFS' EXHIBIT 137

MARANATHA BAPTIST BIBLE COLLEGE
Watertown, Wisconsin 53094

February 6, 1974

Dear Mr. Wood,

Through Rev. Robert Holbrook, Pastor of First Baptist Church, Hallettsville, Texas 77964, I have learned of your signature to a document which states that the Helms Amendment is a mistake and strongly suggest repeal of this same amendment.

As a Baptist minister and educator, I am greatly surprised that you as a Baptist minister would sign such a document, which is totally contrary to the teaching of God's Word and also that your signature would be identified with such others who are noted for their opposition to the truths of Bible-believing Christianity. The Bible is very clear about Bible-believers not being identified with those who deny the truths of God's Word—Romans 16:17, 18; II Corinthians 6:14-17; Ephesians 5:11; etc.

I am a Baptist. You are a Baptist. Baptists are supposed to be those who believe the Bible. You are representing Baptists in Washington.

I urge you to withdraw your name immediately from the above document, refuse to support those who advocate murder and totally and courageously support the Helms Amendment.

PLAINTIFF'S EXHIBIT 138

COMMUNINTY BAPTIST CHURCH
Sabattus, Maine

from the Pastor's Desk:

Dear Mr. Wood, or to whom it may concern,

* * * *

Things are not going too good in this world and . . . in this Nation too. Like in the Days of the Judges (O.T.) people "liberating themselves" do what is right in their *own* eyes. Not only in the world but also in the Church. This is well to be included as a reason that it is so embarrasingly difficult to gain some new Church members from those who are wrestling with these issues and miss firmness and thoroughness and Theological Genius (in the Church) which HAS to be behind any decision in which the Church is instrumental.

Abortion is just ONE of the big topics. We are well familiar with the "Convenience" reasonings of the pro's. Convenience and inconvenience, however is not something new.

But what *IS* rather new in Church Circles is the ABSENCE of the climate of Prayer. Based on the knowledge that here is a matter which should NOT be decided on as if it is a tax issue or the building of a Super Highway, yes or No, one knows—should know—that here is something of the highest order and ONLY fools will tread where angels don't dare to.

Who of the ones who have spoken have studied the thorough process of the Generation of Diversity, the differentiation process which has already lead to the cell variation resulting in highly organized multiple organs in the foetes and meanwhile studied the Bible, cried out to God and called for Prayer Meetings and THEN—and Not sooner—spoken in favour of Abortion? Who?

As of now I am horrified to see the Executive Director of the Baptist Joint Committee on Public Affair appearing on the Pro-List".

PLAINTIFFS' EXHIBIT 457

RIGHT TO LIFE

Right to Life Society of Greenville
P. O. Box 5065
Greenville, Mississippi 38701
Phone 332-6176

Newsletter #3

EDITORIAL BY A PASTOR

WHY BIBLE-BELIEVERS OPPOSE ABORTION

True Bible-believers are firm in their conviction that the Bible is the only reliable source of faith and practice. This necessitates their understanding what the Bible teaches about that faith and practice so that they can diligently apply those principles to everyday activity. There is no doubt in their minds that there are opposing forces working in the affairs of men, because the Bible clearly states that God, the Creator, and Satan, the Destroyer, are in spiritual conflict from the book of Genesis through the book of Revelation.

When moral questions arise, the people of God, having been made new creatures through the new birth in Christ Jesus, immediately search the Scriptures for principles of right and wrong, and having found them, they firmly take their stand on those teachings.

On the question of abortion, the true Bible-believer must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong, and destructive to the will of God in His plan for the human race.

Some of these Bible principles are seen in the facts that:

1. God creates life in the womb. (Jeremiah 1:5)
2. God sustains life in the womb. (Acts 17:28)
3. God commands life through the womb. (Genesis 1:28)

4. God blesses life from the womb. (Genesis 49:25)
5. God spares life to come from the womb. (Galatians 1:15)
6. God rejoices life in the womb. (Luke 1:41, 44)
7. God fills a life with the Holy Spirit in the womb. (Luke 1:15)
8. God calls life in Elizabeth's womb "a son." (Luke 1:13)
9. God names life in the womb "John" (Luke 1:13), and "Jesus" (Matthew 1:21)
10. God ordains life in the womb to accomplish great things in His purposes. (Matthew 1:21 and Luke 1:16)

In the light of the Bible teaching that an unborn baby is called a child (Matthew 1:18), and in these days of tragic compromise to Satan's deception, one cannot help but wonder how many great men, women, and leaders have been aborted by those who forget that:

"Jesus loves the little children,
All the children of the world,
Red and yellow, black and white,
They are precious in *His* sight,
Jesus loves the little children of the world."

Hugh A. Martin, Pastor
Emmanuel Baptist Church
Greenville, Mississippi

* * * * *

PLAINTIFFS' EXHIBIT 420

RIGHT TO LIFE

NEWSLETTER

VOL. I No. 22 Oct. 25, 1973 41 State St. Albany, N.Y. 12207

Dear Right to Lifers,

* * * * *

we exist for the purpose of protecting innocent human life—we don't exist to serve an organization. God willing, we shall keep His purposes uppermost and our egos hindmost.

* * * * *

12. One resolution which can't wait any longer is one calling for all RTL people to make a special effort to pray together (although separated by miles) between 12:00 noon and 12:15 p.m. and every Thursday. Only the Devil voted against it—all RTL voted it.

* * * * *

Go with God in all endeavors,

John Middleton, PhD
CHAIRMAN

PLAINTIFFS' EXHIBIT 429

NEW YORK STATE
RIGHT TO LIFE COMMITTEE, INC.

March 31, 1976

Save-A-Baby Campaign time is here. It seems impossible that another year has gone by so quickly. As long as the 20th Century Slaughter of the Innocent continues, we must continue to beg for funds to maintain their only organized Voice—The Right to Life Movement.

* * * * *

If you need volunteers, and there are not enough active members in your group, telephone or personally visit the pastors and leaders of the local Churches and Synagogues. Ask them to supply you with volunteers who will have the opportunity of helping the pro-life movement, particularly on Mother's Day. Be sure to have a well thought out plan with you. Example: Ask prolifers (or even members of one family) to sell chances before and after services.

* * * * *

May God bless you for your continuing dedication in the work which we have all been called.

PLAINTIFFS' EXHIBIT 433

September 3, 1976

TO: Area Directors

FROM: Marge Fitton
Treasurer, NYSRTLC

SUBJECT: RESPECT LIFE COLLECTIONS

By this time your local Bishop, or his Vicar, hopefully has sent a letter to his parishes sanctioning the October RESPECT LIFE Collections.

* * * * *

Because of the Catholic Committee's positive spirit of cooperation with New York State Right to Life Committee we expect that our largest contributions will be from the Catholic community. However, once again, we beg you not to over-look your local Protestant and Jewish clergy. A leter, 'phone call, or personal visit from the local Chairman asking for an "Ecumenical Witness to Life" by means of your call could bring at least three great blessings: (1) More God loving people united in the defense of innocent life; (2) A dispersion of the media's determination to label the pro-life movement as strictly Catholic. (3) An increase of the funds needed by both your group and the state office to continue our work.

* * * * *

PLAINTIFF'S EXHIBIT 444

NEW YORK STATE RIGHT TO LIFE COMMITTEE, INC.

STATEMENT OF REVENUES

OCTOBER 1, 1976-JULY 31, 1977

	Amount	Total
MEMBERSHIPS		
Individuals	$ 325.00	$
Family	280.00	
Sponsor	420.00	1,025.00
GROUP AFFILIATIONS		
Provisional	500.00	
Full	4,000.00	4,500.00
DONATIONS		
Group	308.54	
Individual	332.00	640.54
JEWELRY		152.50
EDUCATIONAL MATERIAL		433.18
REIMBURSEMENTS		
Newsletter	2,720.85	
Xerox	144.26	
Misc.	116.09	2,981.20
SAVE-A-BABY		25,569.07
RESPECT LIFE COLLECTIONS		77,656.77
INTEREST INCOME (NEW YORK TELEPHONE)		16.00
MEETINGS - LUNCHEONS		294.66
PATRONS—ANNUAL CONVENTION		219.00
TOTAL REVENUES:		113,487.92

P. Ex. 352/St. Louis Cathedral Bulletin

JOHN JOSEPH CARDINAL CARBERRY
ARCHBISHOP OF SAINT LOUIS

SAINT LOUIS CATHEDRAL BULLETIN

VOL. 74, NO. 12 APRIL 2, 1978

* * *

PICKET ABORTION CLINIC

APRIL 15, 1978 is the date assigned to the St. Louis Cathedral Parish for picketing THE ABORTION CHAMBER at 130 North Euclid.

EVERYONE, regardless of any other interests, should be a part of the Pro-Life Movement. Do not be confused by slogans, such as; 'imposing your morality on others', etc. TO BE SILENT IS TO CONSENT.

A Christian pro-life picketer shows visably that he is not being silent. Our Lord said, "Your light must shine before men so that they may see goodness in your acts and give praise to your heavenly Father." (Matthew 5:16)

NO CHRISTIAN WILL EXCUSE HIMSELF LIGHTLY ON THIS DUTY.

March for Life

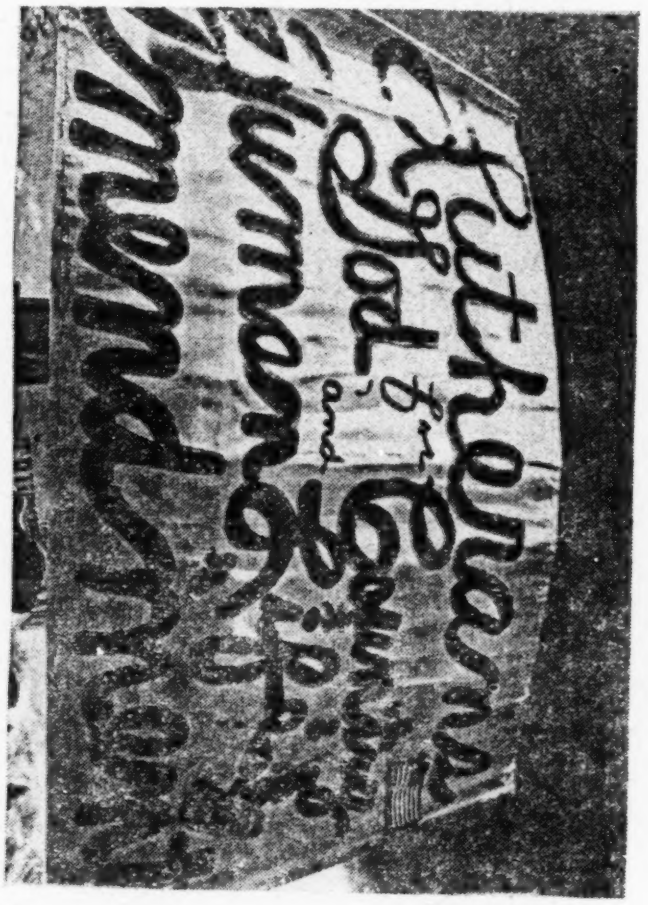
Dear Marchers for Life,

January 22, 1978 — five years after the Supreme Court's infamous abortion decisions! Because that date falls on Sunday, we will extend the annual MARCH FOR LIFE activities to Monday, January 23, 1978, when the Congress is in session. See the "Program" below.

Abortionists predicted that, with abortions legal, prolifers would gradually accept them as part of the modern way of life. But, we have not accepted killing preborn or born human beings as a way of life for our society, and we continue to wage the necessary, just and peaceful war against the evil of abortion and all other evils which have come in its wake. There have been some prolife successes as skirmishes were won during 1977. However, prolifers continue the battles so that good can triumph over evil.

* * *

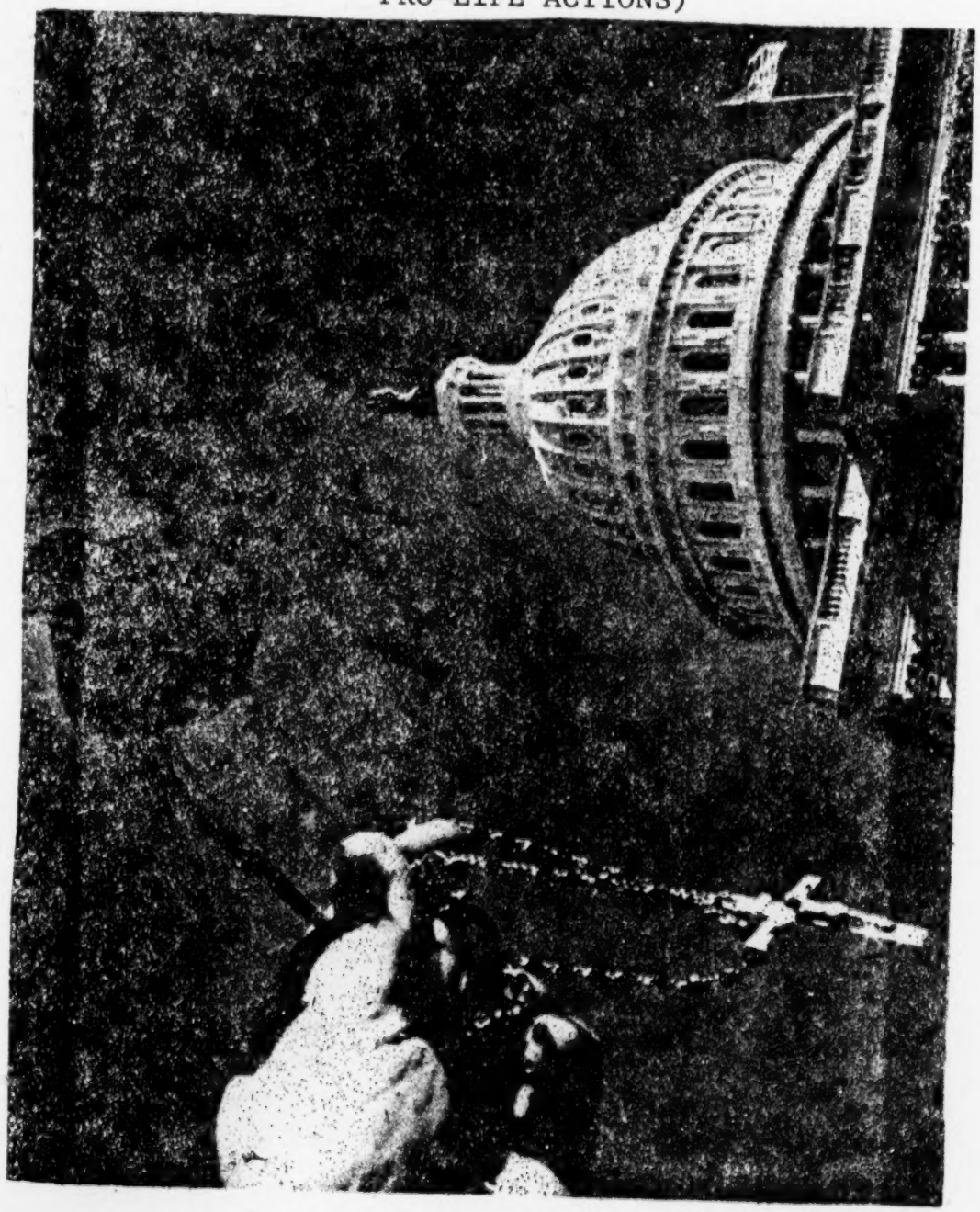
The beautiful red rose, symbol of short life and martyrdom, has done a powerful job of lobbying for the preborn child. We must keep the roses working!



P. Ex. 456/Photographs of March for Life
January 22, 1978, Washington, D. C.

P. Ex. 453/The Long Island Catholic,
January 19, 1978, page 1

(Headline: BISHOP ASKS SUPPORT FOR
PRO-LIFE ACTIONS)



P. Ex. 453/The Long Island Catholic, January 26, 1978, page 26

Members of St. Brigid's parish in Westbury with the Rev. Arthur C. Anderson (left background) of St. Pius X Preparatory Seminary, Uniondale.

P. Ex. 453/The Long Island Catholic, January 26, 1978, page 26 (cont'd)

One of the lead banners in the march represented the Knights of Columbus who came from various areas of the nation.

Seminarians from various dioceses marched together under this banner.

SUPREME COURT OF THE UNITED STATES

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT,

v.

CORA MCRAE, ET AL.

APPEAL from the United States District Court for the Eastern District of New York.

Treating the application for stay of the judgment of the United States District Court for the Eastern District of New York as a statement as to jurisdiction, probable jurisdiction is noted. Opening briefs on the merits shall be filed on or before March 18, 1980. Replies thereto shall be filed on or before April 10, 1980. The case is set for oral argument in tandem with No. 79-4, *Williams* v. *Zbaraz;* No. 79-5, *Miller* v. *Zbaraz;* and No. 79-491, *United States* v. *Zbaraz.*

February 19, 1980

[SEAL]

OFFICE OF SOLICITOR GENERAL

Received

Feb. 27, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 316022 258

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1268

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

ELOISE E. DAVIES
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement	3
Summary of argument	18
Argument	21
I. The Hyde Amendment does not violate the Due Process Clause of the Fifth Amendment because Congress had a rational basis for treating abortion differently from other medically necessary procedures	21
II. The Hyde Amendment does not violate the First Amendment or deprive Medicaid-eligible pregnant women of the liberty guaranteed by the Fifth Amendment	28
A. The district court correctly concluded that the Hyde Amendment is not a "Law Respecting an Establishment of Religion"	28
B. The Hyde Amendment does not restrict the free exercise of religion or deprive pregnant women of the liberty guaranteed by the Fifth Amendment	31
Conclusion	39
Appendix	1a

CITATIONS

Cases: Page

Abington School District v *Schempp*, 374 U.S. 203 ..... 35, 36
Bailey v. *Patterson*, 369 U.S. 31 33
Beal v. *Doe*, 432 U.S. 438 ..... 11, 23
Board of Education v. *Allen*, 392 U.S. 236 35
Braunfeld v. *Brown*, 366 U.S. 599 36
Califano v. *McRae*, 433 U.S. 916 11
Califano v. *McRae*, 434 U.S. 1301 11
Dayton Board of Education v. *Brinkman*, 433 U.S. 406 26
Doe v. *Bolton*, 410 U.S. 179 4
Epperson v. *Arkansas*, 393 U.S. 97 29
Everson v. *Board of Education*, 330 U.S. 1 29
Geduldig v. *Aiello*, 417 U.S. 484 27
Houchins v. *KQED, Inc.*, 438 U.S. 1 37
Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 ..... 34, 36
Jefferson v. *Hackney*, 406 U.S. 535 26
Maher v. *Roe*, 432 U.S. 464 ..... 11, 23, 37, 38
Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307 27
McDaniel v. *Paty*, 435 U.S. 618 31
McGowan v. *Maryland*, 366 U.S. 420 ..... 19, 28, 32, 36
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 35
Norwood v. *Harrison*, 413 U.S. 455 37
O'Shea v. *Littleton*, 414 U.S. 488 33
Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256 26
Planned Parenthood of Missouri v. *Danforth*, 428 U.S. 52 27

Cases—Continued Page

Roe v. *Wade*, 410 U.S. 113 ..... 4, 19, 23, 30
Vance v. *Bradley*, 440 U.S. 93 27
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 26
Warth v. *Seldin*, 422 U.S. 490 ..... 33, 34, 36
Washington v. *Davis*, 426 U.S. 229 26
Zbaraz v. *Quern*, 469 F. Supp. 1212, question of jurisdiction postponed, Nos. 79-4, 79-5, and 79-491 (Nov. 26, 1979) 18, 21, 22

Constitution, statutes, rule and regulations:

United States Constitution:

First Amendment ..... *passim*, 1a
Fourth Amendment 14
Fifth Amendment ..... *passim*, 1a
Ninth Amendment 14

Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U.S.C. (Supp. II) 300a-21 *et seq.* 25

42 U.S.C. (Supp. II) 300a-21(a) 15
42 U.S.C. (Supp. II) 300a-21(b)(1) 26

Social Security Act, 42 U.S.C. 301 *et seq.*:

42 U.S.C. 601 *et seq.* 3
42 U.S.C. 1381 *et seq.* 3
42 U.S.C. 1396 *et seq.* 3
42 U.S.C. 1396a(a)(10)(A) 3
42 U.S.C. 1396a(a)(10)(C) 3
42 U.S.C. 1396a(a)(13)(B) 4
42 U.S.C. 1396a(a)(17)(A) 5
42 U.S.C. 1396d(a)(1)-(5) 4

Pub. L. No. 94-439, Section 209, 90 Stat. 1434 ..... 5, 2a

Constitution, statutes, rule and regulations—Continued — Page

Pub. L. No. 95-130, 91 Stat. 1153 — 6
Pub. L. No. 95-165, 91 Stat. 1323 — 6
Pub. L. No. 95-205, 91 Stat. 1460 — 5-6
Pub L. No. 95-480, 92 Stat. 1586 — 6
Section 210, 92 Stat. 1586 — 1a-2a
Pub. L. No. 96-86, 93 Stat. 659, 662 — 7
Pub. L. No. 96-123, 93 Stat. 925, 926 — 7, 1a
79 Stat. 343 — 4
Sup. Ct. R. 10(4) — 9
42 C.F.R. 440.230(b) — 5
42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978) — 4
42 C.F.R. 440.230(c)(2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978) — 5

Miscellaneous:

123 Cong. Rec. S19439-S19446, H12769-H12776, H12827-H12831 (daily ed. Dec. 7, 1977) — 6
125 Cong. Rec. H9075-H9082, S14491-S14497 (daily ed. Oct. 12, 1979) — 7
125 Cong. Rec. S16882-S16885, H10953-H10960 (daily ed. Nov. 16, 1979) — 7
Note, *Medicaid and The Abortion Right*, 44 Geo. Wash. L. Rev. 404 (1976), citing 2 *Family Planning Pop. Rep.* (1973) — 30

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

OPINIONS BELOW

The opinion of the district court on remand is not yet reported.[1] The initial opinion of the district court (76-1113 J.S. App. 1a-25a) is reported at 421 F. Supp. 533.

JURISDICTION

The judgments of the district court (A. 86-89) were entered on January 15, 1980. On the same day, the Secretary of Health, Education, and Welfare filed a notice of appeal to this Court (A. 19), and, on February 11, 1980, the Secretary applied for a stay pending disposition of her appeal. On February 19, 1980, this Court denied the stay, treated the application as a jurisdictional statement, and noted probable jurisdiction (A. 332). This Court's jurisdiction rests on 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether the Hyde Amendment violates the equal protection component of the Due Process Clause of the Fifth Amendment by authorizing the use of federal funds for medically necessary services generally and for abortions only "where the life of the mother would be endangered if the fetus were carried to term" but not for other "medically necessary" abortions.

2. Whether, by restricting the availability of federal funds for "medically necessary" abortions, the

[1] On March 17, 1980, the Court granted the Secretary's motion to dispense with the printing of the district court's opinion and accompanying annex.

Hyde Amendment deprives pregnant women of the liberty protected by the Due Process Clause of the Fifth Amendment or the religious freedom protected by the Free Exercise Clause of the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in the appendix to this brief (App., *infra*, 1a-2a).

STATEMENT

1. Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.*, establishes a medical assistance program, commonly known as "Medicaid," under which the federal government provides financial assistance to those states that choose to reimburse the costs of medical treatment for needy persons. For a state to qualify for federal assistance under Title XIX, its Medicaid plan must include coverage for the "categorically needy" [2] for at least five gen-

[2] The "categorically needy" group includes families with dependent children eligible for assistance under the Aid to Families with Dependent Children program (42 U.S.C. 601 *et seq.*) and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program (42 U.S.C. 1381 *et seq.*). See 42 U.S.C. 1396a(a)(10)(A). The states may also choose to extend Medicaid coverage to other persons, termed the "medically needy," who would be eligible for AFDC or SSI payments if they did not have income or resources in excess of the statutory standards and who have insufficient income and resources to pay for necessary medical care. See 42 U.S.C. 1396a(a)(10)(C).

eral categories of medical treatment: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities services, periodic screening and diagnosis of children, and family planning services, and (5) physician's services. 42 U.S.C. 1396a(a)(13)(B) and 1396d(a)(1)-(5).

The Act does not expressly require that participating states pay for the cost of abortions or any other particular medical procedures,[3] but the statute does provide that Medicaid beneficiaries must receive, at minimum, services within the categories specified above. A federal regulation under the Act provides that state Medicaid agencies "may not arbitrarily deny or reduce the amount, duration, or scope of a required service [*i.e.*, a service within any or the five mandatory categories] * * * to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." 42 C.F.R. 440.230(c)(1), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

With respect to the persons eligible for Medicaid benefits and the level of payments available, the Act requires each state Medicaid plan to "include reasonable standards * * * for determining eligibility for

---

[3] Indeed, when Title XIX was added to the Social Security Act in 1965 (79 Stat. 343), most "medically necessary" abortions were illegal in most states. *Roe* v. *Wade*, 410 U.S. 113, 118 & n.2 (1973). This Court's rulings in *Wade* and its companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973), established the constitutional right of a woman to seek an abortion during the first trimester of pregnancy.

and the extent of medical assistance under the plan which * * * are consistent with the objectives of [Title XIX] * * *." 42 U.S.C. 1396a(a)(17)(A). An implementing regulation permits participating states to place reasonable limits on the amount of a particular kind of care that will be covered. 42 C.F.R. 440.230(b). The same regulation authorizes state agencies to "place appropriate limits on a service based on such criteria as medical necessity * * *." 42 C.F.R. 440.230(c)(2), as corrected, 43 Fed. Reg. 57253 (Dec. 7, 1978).

2. In September 1976, Congress limited the availability of federal funds to reimburse the cost of medically indicated or "therapeutic" abortions. Section 209 of Pub. L. No. 94-439, the appropriations act for the Department of Health, Education, and Welfare for fiscal year 1977, provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." 90 Stat. 1434. This provision is commonly known as the Hyde Amendment, after its original congressional sponsor, Representative Henry J. Hyde of Illinois.

On December 7, 1977, Congress passed a joint resolution providing appropriations for HEW for the last 10 months of fiscal year 1978 and including a modified version of the Hyde Amendment to govern the availability of federal Medicaid funds for abortions during that period. Pub. L. No. 95-205, 91 Stat.

1460; 123 Cong. Rec. S19439-S19446, H12769-H12776, H12827-H12831 (daily ed. Dec. 7, 1977).[4] The modified Hyde Amendment listed two additional exceptions to the general prohibition against the use of appropriated funds for abortions. It stated:

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

This revised version of the Hyde Amendment was repeated in the HEW appropriations act for fiscal year 1979 (Pub. L. No. 95-480, 92 Stat. 1586).

In large measure because the Senate and the House of Representatives could not agree on whether this modified approach to federal funding for abortions should be retained for fiscal year 1980, Congress was unable to enact a new annual appropriations bill for

---

[4] HEW appropriations for October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that simply continued in effect the original version of the Hyde Amendment passed the previous year. Pub. L. No. 95-130, 91 Stat. 1153; Pub. L. No. 95-165, 91 Stat. 1323.

HEW by the October 1979 deadline.[5] Instead, on October 12, 1979, Congress adopted a joint resolution providing appropriations for HEW for the period ending November 20, 1979, and deleting the third exception in the modified Hyde Amendment language originally enacted in December 1977. Pub. L. No. 96-86, 93 Stat. 659, 662; 125 Cong. Rec. H9075-H9082, S14491-S14497 (daily ed. Oct. 12, 1979). The new appropriations measure stated:

> [N]one of the Federal funds provided by this joint resolution * * * shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service.

After further debate, the same language was included in another joint resolution adopted by Congress on November 16, 1979, making appropriations for HEW for the remainder of fiscal year 1980. Pub. L. No. 96-123, 93 Stat. 925, 926; 125 Cong. Rec. S16882-S16885, H10953-H10960 (daily ed. Nov. 16, 1979).

Thus, the currently effective statutory limitation on the use of federal funds for abortions under the

---

[5] The details of the legislative disagreement during the summer of 1979 are summarized in *United States* v. *Zbaraz*, No. 79-491, Jurisdictional Statement 6 n.3. See also the annex to the district court's opinion at pages 293-313.

Medicaid Act is broader than the original Hyde Amendment in that it permits the use of federal funds to terminate pregnancies resulting from promptly reported rape or incest. It is narrower than the modified version of the Hyde Amendment that governed during fiscal years 1978 and 1979 in that it does not permit the use of federal funds to terminate pregnancies that will result in severe and long-lasting damage to the mother's physical health.

3. These consolidated cases were filed in the United States District Court for the Eastern District of New York on September 30, 1976, the day that Congress enacted the initial version of the Hyde Amendment. The original plaintiffs in No. 76-C-1804 were Cora McRae, a New York resident and Medicaid recipient who was in the first trimester of pregnancy and wished to have an abortion but did not allege that the procedure was medically necessary or that continuation of the pregnancy would endanger her life;[6] Irwin B. Teran, a physician who performs abortions for Medicaid recipients;[7] and Planned

[6] Plaintiff McRae sued on her own behalf and on behalf of "the entire class of pregnant or potentially pregnant women in the State of New York who are eligible for Medicaid, who with their physician have decided on abortions, for whom abortions are medically appropriate and who are prevented from obtaining medical termination of their pregnancies by the Hyde Amendment" (A. 33).

[7] Plaintiff Teran sued on his own behalf and on behalf of "the entire class of duly licensed physicians and surgeons certified for participation in Medicaid and presently performing or desiring to perform the termination of pregnancies of members of the * * * class of women" named in the complaint (A. 34).

Parenthood of New York City, a non-profit corporation that provides family planning services and operates clinics where abortions are performed for Medicaid recipients. The plaintiff in No. 76-C-1805 is the New York Health and Hospitals Corporation, a public benefit corporation that operates 16 municipal hospitals, 12 of which provide abortion services.

Both complaints named the Secretary of Health, Education, and Welfare as the sole defendant. On October 19, 1976, the district court permitted Representative Henry J. Hyde of Illinois, Senator James L. Buckley of New York, and Senator Jesse A. Helms of North Carolina to intervene as defendants. The court also appointed Isabella M. Pernicone as the guardian *ad litem* for unborn children and permitted her to intervene as a defendant.[8]

Plaintiffs sought to enjoin enforcement of the Hyde Amendment. They complained that by prohibiting federal financial assistance for abortions except where the mother's life was in danger but at the same time permitting federal payments for costs associated with childbirth, the statute violated the equal protection principle embodied in the Due Process Clause of the Fifth Amendment. Plaintiffs asserted that the Hyde Amendment drew an invidious distinction between Medicaid recipients who carry their pregnancies to term and Medicaid recipients who choose to have an

[8] Under Rule 10(4) of the Rules of this Court, the intervenor-defendants are appellees in the Secretary's direct appeal to this Court. When the term "appellees" is used in the remainder of this brief, however, it refers only to the parties who were plaintiffs in the district court.

abortion for any reason other than the preservation of their own lives. (A. 37). They further contended that the statute deprived the plaintiff pregnant women of "their right to control their own persons, and to privacy and liberty in matters relating to marriage, sex, procreation and the family, all in violation of the Fourth, Fifth and Ninth Amendments to the Constitution" (A. 37). In addition, the complaint alleged that the Hyde Amendment deprived the plaintiff physicians of "the right to practice medicine in accordance with their best medical judgment as guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution" (A. 39). Finally, plaintiffs maintained that the Amendment served no secular purpose and therefore constituted an establishment of religion, in violation of the First Amendment (A. 40).

4. After a hearing, the district court entered a preliminary injunction on October 22, 1976, prohibiting the Secretary from enforcing the Hyde Amendment and requiring him to "[c]ontinue to authorize and expend federal matching funds for abortions provided to women eligible for Medicaid at the proportionate level and in accordance with the standards under which they were being paid before enactment of" that statute. *McRae* v. *Mathews*, 421 F. Supp. 533, 543, reprinted in 76-1113 J.S. App. 23a-24a. In addition, the court ordered the Secretary to give notice of the injunction to all state and local Medicaid authorities and providers (*id.* at 24a-25a). The court certified No. 76-C-1804 as a class action on behalf of

(1) pregnant or potentially pregnant Medicaid-eligible women in the State of New York who decide to have an abortion within the first 24 weeks of pregnancy; and (2) duly-licensed and Medicaid-certified providers of abortion services to Medicaid-eligible pregnant women (*id.* at 23a).

On October 29, 1976, the district court denied the Secretary's motion to amend the preliminary injunction to provide that Medicaid funds paid to the states as a result of the court's order would be subject to recoupment if the order were reversed on appeal (76-1113 J.S. App. 26a-29a). At the same time, the court observed that, because its preliminary injunctive order was not the final judgment, the accompanying opinion "did not explicitly hold that [the Hyde Amendment] was unconstitutional." The court added, however, that such a holding was "implicit in the granting of the injunction" (*id.* at 29a).

The Secretary appealed to this Court and suggested that the case be held for disposition in light of two other abortion funding cases then pending before the Court, *Maher* v. *Roe*, 432 U.S. 464 (1977), and *Beal* v. *Doe*, 432 U.S. 438 (1977). After deciding *Maher* and *Beal*, this Court vacated the injunction in *McRae* and remanded the case for further consideration in light of those decisions. *Califano* v. *McRae*, 433 U.S. 916 (1977). See also *Califano* v. *McRae*, 434 U.S. 1301 (1977) (Marshall, Circuit Justice).

5. On remand, the district court permitted several additional plaintiffs to intervene. Plaintiffs Jane Doe, Mary Doe, Susan Roe, and Ann Moe are Medicaid re-

cipients who wished to have abortions that allegedly were medically necessary but did not qualify for federal funding under either the 1977 or the 1978 version of the Hyde Amendment (A. 60-61).[9] Plaintiffs Jane Hodgson, David Bingham, Hugh Savage, Edgar Jackson, and Lewis Koplik are physicians who practice in states other than New York and who perform abortions for Medicaid recipients (A. 62-63).[10] Plaintiff Women's Division of the Board of Global Ministries of the United Methodist Church is the policy-making body for United Methodist Women, an organization whose membership allegedly includes (1) "poor, pregnant women who are dependent on Medicaid to obtain safe, legal abortions, whose ability to

[9] Plaintiff Jane Doe is a resident of Connecticut and the other three named pregnant women who intervened as plaintiffs on remand are residents of Minnesota. Together with plaintiff McRae, these plaintiffs asked the district court to certify a class of all "pregnant or potentially pregnant women who are eligible for medical assistance provided under their state plans; who with their physicians have decided on abortions; for whom abortions are medically necessary; who have been, are or will be prevented from or impeded in obtaining medical termination of their pregnancies by the Hyde Amendments" (A. 65). The amended complaint asserts that the class includes women "of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary" (*ibid.*). None of the named plaintiffs claimed that she personally sought an abortion for reasons of religion or conscience. See A. 60-61.

[10] Together with plaintiff Teran, the intervening physician plaintiffs sought to proceed as representatives of the class of all "duly licensed and Medicaid certified providers of abortional services to eligible women" (A. 66).

obtain such is impeded or precluded by the Hyde Amendments, and who object to having someone else's religious beliefs about abortions imposed upon them thereby inhibiting their freedom of conscience" and (2) "federal taxpayers who object to the Hyde Amendments as violating the First Amendment's limitations on the taxing and spending powers" (A. 63-64). Plaintiffs Theressa Hoover and Ellen Kirby are officers of the Women's Division and federal taxpayers (A. 64-65).

In January 1978, plaintiffs filed an amended complaint challenging the various versions of the Hyde Amendment on numerous grounds. They alleged first that the Hyde Amendment, to the extent it permits states participating in the Medicaid program to refuse to fund some medically necessary abortions, violates the Medicaid Act (A. 72-73). In the alternative, they argued that, notwithstanding the Hyde Amendment, participating states remain obligated under the Medicaid Act to fund all medically necessary abortions (A. 72, 73).

Plaintiffs further asserted that the Hyde Amendment violates the equal protection component of the Due Process Clause of the Fifth Amendment in several ways: (1) by distinguishing between medically necessary services generally and medically necessary abortions; (2) by distinguishing between women, for whom federal Medicaid funds are not available for one kind of medically necessary care, and men, for whom federal Medicaid funds are generally available for medically necessary services; (3) by distinguish-

ing between women who choose to carry their pregnancies to term and women who seek to terminate their pregnancies by abortion; (4) by distinguishing between indigent women and women who are able to pay for abortions; and (5) by distinguishing between women who are members of racial or ethnic minorities and other women (A. 72-76). Plaintiffs also alleged that the Hyde Amendment "punishes" pregnant women who choose to exercise the right to obtain an abortion guaranteed by the First, Fourth, Fifth, and Ninth Amendments to the Constitution (A. 75).

With respect to the plaintiff class of physicians, the amended complaint contended that the Hyde Amendment denies those doctors "the right to practice medicine in accordance with their best medical judgment" and also deprives them of "substantial income from abortion services normally rendered to Medicaid-eligible women" (A. 77).

Finally, plaintiffs asserted that "[t]here is no secular justification for the Hyde Amendments" and that the federal abortion funding restrictions "constitute enactment into law of one religious belief respecting abortions and the nature of the fetus and the imposition of that religious view on Medicaid-eligible women who would otherwise choose abortion in accordance with their religious or nonreligious beliefs" (A. 79). On this basis, plaintiffs maintained that the Hyde Amendment violates both the Establishment Clause and the Free Exercise Clause of the First Amendment.

6. Between August 1977 and September 1978, the district court conducted a trial during which plaintiffs introduced voluminous evidence concerning the medical reasons for abortions and the diverse religious views on the subject.[11] On January 15, 1980, the district court issued an opinion that summarized the evidence at length and invalidated all versions of the Hyde Amendment on equal protection grounds. The court held that the statutory distinction between medically necessary abortions and other medically necessary services bears no rational relationship to any legitimate governmental interest (Opinion 310-315, 316-323). In the court's view, when an abortion is "medically necessary to safeguard the pregnant woman's health, * * * the disentitlement to medicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate her pregnancy in order to preserve her health" (*id.* at 313). In addition, citing a provision in the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U.S.C. (Supp. II) 300a-21(a), the court ruled that the Hyde Amendments are invalid because they "clearly operate to the disadvantage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy * * * and particularly those seventeen and under" (Opinion 315).

---

[11] The record contains more than 400 documentary and film exhibits. The transcript of the district court proceedings exceeds 5,000 pages.

Turning to plaintiffs' First Amendment challenges to the abortion funding restrictions, the court rejected the Establishment Clause argument but held that the Hyde Amendments violate the constitutional right to the "free exercise" of religion (Opinion 323-328). Although the court acknowledged that the purpose of the Hyde Amendments was not "identifiably religious" and did not become so merely because "the most vigorous spokesmen for [the statutes] put their case in religious terms" (*id.* at 324), it ruled that the Amendments "do raise grave First and Fifth Amendment problems affecting individual liberty" (*id.* at 326). Relying on evidence regarding the teachings of Conservative and Reform Judaism, the American Baptist Church, and the United Methodist Church (*id.* at 178-199), the court stated that, in some cases at least, a pregnant woman's decision to have a medically necessary abortion may be based on religious considerations. The court declared that "[t]he liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons" (*id.* at 327-328). The opinion concluded with the following paragraph (*id.* at 328):

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

Accordingly, the district court ordered the Secretary to "[c]ease to give effect" to the Hyde Amendments insofar as they forbid federal Medicaid payments for abortions that are "necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman" (A. 87). The court directed the Secretary to "[c]ontinue to authorize the expenditure of federal matching funds" for such abortions (A. 87). In addition, the court ordered the Secretary to inform HEW's regional directors of the court's decision and to require them to instruct participating states to notify all Medicaid providers of the existence of the injunction (A. 87). Finally, the court recertified the *McRae* case as a nationwide class action on behalf of all Medicaid-eligible pregnant women who wish to have medically necessary abortions and all Medicaid-certified providers of abortion services for such women (A. 92-93).

SUMMARY OF ARGUMENT

I

The Hyde Amendment is a legislative measure rationally designed to further the legitimate governmental interest in preserving potential human life and encouraging childbirth. Medically necessary services other than abortion do not involve the termination of potential human life, and Congress therefore had a rational basis for permitting Medicaid payments for abortion on a more limited basis than for other medically necessary services. The district court's decision to the contrary is similar to the ruling of another district court in *Zbaraz* v. *Quern*, 469 F. Supp. 1212 (N.D. Ill.), question of jurisdiction postponed, Nos. 79-4, 79-5, and 79-491 (Nov. 26, 1979), and we rely primarily on the government's brief in the latter case to demonstrate the flaws in the district court's "equal protection" reasoning here.

Although the opinion of the district court is somewhat cryptic, the court may have intended to invalidate the Hyde Amendment on the independent ground that the statute discriminates impermissibly on the basis of age. That ruling is also erroneous. The Hyde Amendment treats pregnant women of all ages identically, and there is no indication that the statute was passed in order to impose a special disadvantage on persons below the age of 21. If teenage women are disproportionately represented within the group directly affected by the Hyde Amendment, it is because they are more likely to become pregnant and to seek abortions, not because Congress adopted a statutory classification based on age.

II

A. The Hyde Amendment does not violate the Establishment Clause of the First Amendment. There are substantial secular reasons for seeking to encourage childbirth and to discourage the premature termination of pregnancies. As this Court observed in *Roe* v. *Wade*, 410 U.S. 113, 130-131, 134-135, 141-143 (1973), opposition to abortion can be traced to such diverse and secular sources as the ancient Greeks, common law authorities, and the American Medical Association. Congressional judgments on matters of public morality are not invalid merely because they happen to harmonize or coincide with the tenets of a particular religion or religious denomination. *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). Nor does the participation of religious organizations in public debate on a subject automatically render any resulting statute that is consistent with the views of such organizations vulnerable to attack on Establishment Clause grounds.

As the district court recognized (Opinion 323-324), the Hyde Amendment reflects "traditionalist" attitudes toward abortion more than the position of any single religious group. Acceptance of the contrary position advocated by appellees in the district court would have implications far beyond this case. In particular, it would cast substantial doubt on the constitutionality of numerous criminal statutes—for example, those prohibiting polygamy or adultery—

that parallel the rules of conduct espoused by various religious groups.

B. The Hyde Amendment does not violate the Free Exercise Clause of the First Amendment. The constitutional right to practice the religion of one's choice does not entail a corresponding government obligation to pay the cost of conduct undertaken in fulfillment of a person's perceived religious duties. Even assuming that the district court correctly determined that one or more religious denominations teach that abortion is the proper course where necessary to preserve the health of the mother, appellees are not entitled to relief on free exercise grounds.

In the first place, no named pregnant appellee has alleged that her personal religious beliefs impelled her to seek an abortion. Under such circumstances, neither the individual appellees nor the members of the class they represent have standing to assert a cause of action based on the Free Exercise Clause.

Furthermore, even if the free exercise argument is properly presented here, it is incorrect on the merits. The Constitution guarantees numerous personal rights, but it does not require the government to expend public funds in order to ensure that indigent persons may engage in constitutionally protected activities. Religious observance is no more entitled to public subsidy than the speaking and publishing activities protected by other portions of the First Amendment. Indeed, because of Establishment Clause constraints, religious activity may, if anything, be less eligible for public financial support.

Although this Court has recognized a pregnant woman's constitutional right to obtain an abortion, that right does not become imbued with a special status simply because, in a particular instance, its exercise may be religiously motivated. As in the case of other constitutional rights, the government may not interfere with private decision-making, but it need not provide financial encouragement for every conceivable choice a person might make.

ARGUMENT

I

THE HYDE AMENDMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE CONGRESS HAD A RATIONAL BASIS FOR TREATING ABORTION DIFFERENTLY FROM OTHER MEDICALLY NECESSARY PROCEDURES

To the extent that the district court invalidated the Hyde Amendment on equal protection grounds, its decision is similar to the ruling in *Zbaraz* v. *Quern*, 469 F. Supp. 1212 (N.D. Ill.), question of jurisdiction postponed, Nos. 79-4, 79-5, 79-491 (Nov. 26, 1979).[12] Both district courts have held that no legitimate governmental interest justifies the congressional

---

[12] Unlike the district court's holding in *Zbaraz*, the decision in the present case is not limited to medically necessary abortions prior to fetal viability. When the district court certified the plaintiff classes in January 1979 (A. 92-93), it removed the earlier language limiting the class of pregnant women to those who sought abortions within the first 24 weeks of their pregnancies. See page 11, *supra*.

choice to fund medically necessary services generally but to restrict the availability of federal payments for medically necessary abortions. In our view, the district court decisions are incorrect because the Hyde Amendment, in each of its forms, is a rational legislative measure for advancing the legitimate governmental interest in preserving potential human life and encouraging childbirth. The statute also serves the legitimate congressional goal of limiting the expenditure of public funds for a purpose that many taxpayers find morally objectionable.

Because this Court has decided to hear the present case in tandem with *Zbaraz*, we do not repeat in detail the equal protection arguments already advanced by the government in the Illinois case. Instead, we rely primarily on the relevant portion of the government's brief in *Zbaraz* (pages 50-64) to demonstrate the errors in the district court's reasoning here.[13] We add only a brief comment on two aspects of the district court's equal protection ruling that distinguish it to some extent from the decision in *Zbaraz*.

1. In attempting to assess the rationality of the Hyde Amendment, the district court compiled a massive evidentiary record on the nature of the social problem addressed by Congress. During a 13-month trial, the court investigated such matters as the number of abortions performed annually in the United States and other countries, the ratio of abortions to

[13] We have furnished a copy of the government's brief in *Zbaraz* to all of the parties in this case.

live births, the percentage of maternal deaths attributable to abortions, the practical consequences of abortion funding limitations, the relationship between poverty and maternal health, the possible psychological effects of an unwanted pregnancy, and the special medical problems encountered in adolescent pregnancies. The extensive inquiry conducted by the district court reflects the fundamental flaw in the court's approach to judicial review of the Hyde Amendment. The court addressed itself to the question whether the challenged congressional action is a good idea rather than the question whether the limitation on federal funding for abortions satisfies constitutional requirements. The questions are not identical. Courts do not sit as general fact-finding and policy-making bodies charged with the task of identifying and implementing the most desirable solution to broad social problems. That is Congress' responsibility. Reviewing courts decide only whether the legislature has acted within permissible bounds.

Here, the district court uncovered no evidence to contradict this Court's conclusion that Congress and the state legislatures have an "important and legitimate interest in protecting the potentiality of human life." *Roe* v. *Wade*, 410 U.S. 113, 162 (1973). See also *Beal* v. *Doe*, 432 U.S. 438, 445-446 (1977). Nor did the court disagree with the proposition that abortion is the only medically necessary service that involves the purposeful termination of potential human life. See *Maher* v. *Roe*, 432 U.S. 464, 480 (1977). Nor did the court find that the Hyde Amendment's

funding restrictions will not contribute to the preservation of fetal life by discouraging abortions and encouraging childbirth. In the absence of any such finding or evidence, the court should have sustained the validity of the statute.

By undertaking instead an elaborate inquiry into the practical implications of pregnancies among Medicaid-eligible women, the court revealed its misconception of its own role; by concluding that public funds must be provided for medically necessary abortions, the court substituted its judgment for that of Congress and usurped the function of the people's elected representatives. Even if the court's lengthy opinion proved beyond any doubt that the Hyde Amendment is an unwise measure, it would not justify invalidation of the statute on equal protection grounds. Nothing that the court has said detracts from the critical considerations that support the statute's constitutionality: Congress had a rational basis for treating abortions differently from other medically necessary services in dispensing public monies, and that is all that the Due Process Clause requires.

2. An unclear passage toward the end of the district court's opinion (Opinion 315-316) suggests that the court may have held the Hyde Amendment invalid on an independent equal protection ground, separate from and in addition to the allegedly impermissible statutory distinction between abortion and other medically necessary services. The court stated that the Hyde Amendment "clearly operate[s] to the

disadvantage of one suspect class, that is to the disadvantage of the statutory class of adolescents at a high risk of pregnancy * * *, and particularly those seventeen and under * * *." The "statutory class" to which the court referred is derived from the Adolescent Health Services and Pregnancy Prevention and Care Act, 42 U.S.C. (Supp. II) 300a-21 *et seq.* Apparently on the basis of statistics indicating that women under 21 years of age may be disproportionately represented among those for whom an abortion is medically necessary (see Opinion 133-150), the district court determined that the Hyde Amendment discriminates against teenagers and that "[n]o legislative interest outweighing the interest in the teenagers' health can be advanced to justify the discriminatory denial of necessary medical care" (Opinion 316). The court's use of the phrase "suspect class" may have been intended to suggest that a heightened level of equal protection scrutiny must be applied when a statutory classification discriminates on the basis of age. If so, the court erred in two respects.

In the first place, the Hyde Amendment does not treat pregnant teenagers differently from other pregnant women. Federal funds for abortions are available to prospective teenage mothers on the same basis as they are available to older women. Pregnancy, of course, is a condition that does not occur before puberty or after menopause. Any law affecting pregnancy therefore invariably applies only to females within an age range far narrower than the full spectrum from birth to death. This does not mean that

Congress discriminates on the basis of age whenever it legislates on the subject of pregnancy or abortion.

Despite its exhaustive discussion of the legislative history, the district court cited no evidence whatever to show that Congress intended to discriminate against teenagers when it passed the various versions of the Hyde Amendment or that it "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).[14] A mere statistical showing of disproportionate impact does not suffice to establish a legislative classification when the statute itself draws no such distinction. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972). If the rule were otherwise, few Acts of Congress could survive equal protection scrutiny. Any tax or social welfare provision, for example, could be challenged on the ground

[14] If anything, Congress has discriminated in favor of teenagers by enacting the Adolescent Health Services and Pregnancy Prevention and Care Act. The Act provides federal financial support for local efforts to prevent unwanted pregnancies among adolescents, to enable pregnant adolescents to obtain proper care, and to "assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life * * *." 42 U.S.C. (Supp. II) 300a-21(b)(1).

that the group directly affected does not represent a perfect cross-section of society. This Court's equal protection decisions have never suggested that the Constitution requires such an absurd result.

Moreover, assuming that Congress did intend to treat teenagers differently from adults, this Court's cases establish that age is not a "suspect" classification for equal protection purposes. *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Similarly, the Court has reviewed legislative classifications involving pregnancy in accordance with the rational basis test. *Geduldig* v. *Aiello*, 417 U.S. 484, 495-496 (1974). There is no principled reason why a legislative distinction based on both age and pregnancy should be held to a higher standard. Indeed, when this Court reviewed a classification that imposed special burdens on minors seeking abortions, it did not say that strict scrutiny was required, even though both an age classification and the "fundamental" right to obtain an abortion were involved. The Court invalidated a requirement that pregnant teenagers obtain the consent of one parent before obtaining an abortion, not because the State failed to show a compelling governmental interest, but because it failed to show any "significant" interest at all. *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52, 75 (1976).

The proper standard of review having thus been identified, it bears repeating, for purposes of the present case, that Congress has not adopted different Medicaid abortion funding rules based on the age of

the prospective mother. The Hyde Amendment treats all pregnant Medicaid recipients equally. If the class of Medicaid-eligible women who seek medically necessary abortions includes proportionally more teenagers than the population at large or the class of Medicaid-eligible women generally, that circumstance does not convert the Hyde Amendment into a statutory classification based on age. Not even a rational justification for age discrimination need be identified where no discrimination has occurred.

II

THE HYDE AMENDMENT DOES NOT VIOLATE THE FIRST AMENDMENT OR DEPRIVE MEDICAID-ELIGIBLE PREGNANT WOMEN OF THE LIBERTY GUARANTEED BY THE FIFTH AMENDMENT

A. The District Court Correctly Concluded that the Hyde Amendment is not a "Law Respecting an Establishment of Religion"

Appellees argued vigorously in the district court that the Hyde Amendment violates the Establishment Clause of the First Amendment because it allegedly incorporates into law the Roman Catholic Church's doctrines concerning the time at which human life begins and the sinfulness of abortion (see Plaintiffs' First Amendment brief 206-299). The district court properly rejected this argument (Opinion 323-326). As this Court held in *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961), a statute does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions."

To be sure, neither a state nor the federal government can "pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947). But that does not mean that Congress violates the Establishment Clause whenever it regulates conduct or spends public funds in a way that provokes different reactions among different religious groups. When Congress legislates for the general welfare of society, the Establishment Clause is not offended simply because the resulting statute elicits greater approval from one religious denomination or sect than from another. As the Court explained in *McGowan* (366 U.S. at 442):

> Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. [Citations omitted.] The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

The belief that life begins at conception is not exclusively religious in character and is not solely attributable to the Roman Catholic Church.[15] This

---

[15] For this reason, the Court's decision in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), does not control here. In that case, the Court reviewed a state statute that banned the teaching of Darwinian evolution because that theory supposedly conflicted with the Biblical account of creation. The Court invalidated the statute because it had no secular justification whatsoever. *Id.* at 107-108. The Court did not suggest

Court has traced the belief to such diverse secular sources as the Pythagorean school of Greek ethical philosophy and the American Medical Association. *Roe* v. *Wade, supra,* 410 U.S. at 131, 141. The Court also noted that, although it is uncertain whether the common law treated abortion as a crime, Coke did describe the artificial termination of pregnancy as "a great misprision," and Coke's view influenced the development of the law in some American jurisdictions. *Id.* at 135-136.

During the 19th century, the vast majority of states passed strict criminal abortion laws. *Roe* v. *Wade, supra,* 410 U.S. at 138-141. Those laws remained in force for more than a century, and they had a significant effect in shaping public morality with respect to abortion. Within six months of this Court's decision in *Roe* v. *Wade*, 30 states imposed restrictions on the use of their public funds for abortions. Note, *Medicaid and The Abortion Right*, 44 Geo. Wash. L. Rev. 404, 405 n.7 (1976), citing 2 *Family Planning Pop. Rep.* 82, 83 (1973). Such a widespread reaction, occurring in states with very different demographic patterns and ethnic populations, demonstrates that the legislative refusal to fund abortions except in the most compelling circumstances is the product of deeply felt public sentiment and not an outgrowth of the political activities

---

that a state law based on secular considerations, including notions of public morality, must fall simply because those considerations parallel the views of some religious groups.

of a single religious group.[16] Accordingly, the district court properly held that the Hyde Amendment reflects "traditionalist" attitudes towards abortion and is not a "law respecting an establishment of religion" within the meaning of the First Amendment.

B. The Hyde Amendment Does Not Restrict the Free Exercise of Religion Or Deprive Pregnant Women of the Liberty Guaranteed by the Fifth Amendment

The district court ruled that the various versions of the Hyde Amendment "raise grave First and Fifth Amendment problems affecting individual liberty" (Opinion 326). Although the court did not explain its view of the relationship between the two constitutional provisions cited, it did hold that the congressional refusal to fund some medically necessary abortions "violate[s] the pregnant woman's First and Fifth Amendment rights" (*id.* at 328). Relying on testimony from representatives of several church bodies, the court determined that, in some instances, a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs.[17]

---

[16] Religious persons and organizations have the same right to participate in the political process as anyone else. *McDaniel* v. *Paty,* 435 U.S. 618 (1978). To hold that a religious group can speak on a political issue only at the risk of having any resulting legislation invalidated under the Establishment Clause would significantly chill the group's members in the exercise of their First Amendment rights of freedom of speech and association.

[17] Although we regard the matter as essentially irrelevant to the disposition of this case, we question the propriety of the procedure employed by the district court to ascertain the

The court concluded that "[t]he liberty protected by the Fifth Amendment extends certainly to the individual decisions of religiously formed conscience to terminate pregnancy for medical reasons" (*id.* at 327-328). We believe the court's decision is wrong both because appellees lack standing to raise the Free Exercise Clause argument and because Congress does not violate the Constitution by refusing to fund constitutionally protected activity.

1. None of the appellees has demonstrated the injury in fact necessary to confer standing to challenge the Hyde Amendment as an unconstitutional imposition on the First Amendment right freely to exercise one's religion. Cora McRae, Jane Doe, Mary Doe, Susan Roe, and Ann Moe are the named appellees who sued on behalf of the class of indigent pregnant women. They made no allegations in the complaint, much less submitted evidence, concerning their actual religious or moral beliefs. None of them testified at trial, and their affidavits do not suggest that they sought abortions for reasons of conscience or, if so, what those reasons were. Accordingly, none of the appellee pregnant women has standing to present a contention with respect to the Free Exercise Clause. *McGowan* v. *Maryland*, *supra*, 366 U.S. at 429.

---

views of different religions and religious denominations. The testimony of selected representatives of particular religious groups hardly seems a sufficient basis on which to make findings about the personal beliefs of pregnant women who are members of those groups.

The amended complaint does allege that the named appellees sued on behalf of "women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teachings of their religion and/or the dictates of their conscience determined that an abortion is necessary" (A. 65). But such an allegation, even if it is endorsed by the district court (as it was in the present case [18]), cannot create standing for the class unless the named appellees have established their own standing to sue. *O'Shea* v. *Littleton*, 414 U.S. 488, 494-495 (1974); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962). Likewise, the possibility that some class members might have been able to bring their own lawsuit alleging a violation of the Free Exercise Clause is not enough to confer standing on the named appellees. *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975). It follows, therefore, that neither the named pregnant women nor the class of Medicaid-eligible women whom they represent can pursue a "free exercise" cause of action on this record.

Appellees Theressa Hoover and Ellen Kirby are officers of the Women's Division of the Board of Global Ministries of the United Methodist Church.

---

[18] In an order entered on January 29, 1979 (A. 92-94), the district court recertified the plaintiff class of pregnant women in accordance with the allegations in the amended complaint. The order stated that "[t]he class includes women of all religious and nonreligious persuasions and beliefs who have, in accordance with the teaching of their religion and/or the dictates of their conscience determined that an abortion is necessary."

They did provide the district court with a detailed description of their personal religious beliefs. However, neither woman alleged that she is pregnant or likely to become pregnant or that she is eligible for Medicaid. The Hyde Amendment therefore has absolutely no practical effect on appellees Hoover and Kirby or on their right to choose an abortion in accordance with the tenets of their faith.

The Women's Division itself intervened as a plaintiff on behalf of its members, and the amended complaint alleges that the organization's membership includes "poor, pregnant women who are dependent on Medicaid to obtain safe, legal abortions, whose ability to obtain such is impeded or precluded by the Hyde Amendments and who object to having someone else's religious beliefs about abortion imposed upon them thereby inhibiting their freedom of conscience" (A. 63-64). But the Women's Division does not identify a single member who was deterred or prevented by the Hyde Amendment from seeking a medically necessary abortion for reasons of religion or conscience. It is thus not at all certain whether the Hyde Amendment actually influences the individual moral choices of the Division's members. Moreover, an association may not assert the constitutional rights of its members where those rights are so personal as to require individualized proof. *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 342-343 (1977); *Warth* v. *Seldin*, *supra*, 422 U.S. at 511. A lawsuit that challenges an alleged governmental interference with personal religious or moral choice

ordinarily requires individualized proof focused on the beliefs of a particular plaintiff. Such a case presents precisely the kind of situation in which associational representation is inappropriate. As this Court has stated, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). Following this principle, the Court has found no violation of the Free Exercise Clause where the litigants "have not contended that the [statute in question] coerces them *as individuals* in the practice of their religion." *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) (emphasis added).

It is possible, of course, that in a particular case there may be a compelling reason why the members of a religious organization cannot speak for themselves, and in such circumstances it might be desirable to permit the organization to assert the free exercise rights of its members. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (association permitted to assert members' constitutionally protected interest in not having membership status revealed). Or a particular free exercise claim might, for some reason, be especially amenable to resolution in a lawsuit brought by an association rather than an individual. Even conceding the existence of such possibilities, however, there is no reason in the present case to permit the Women's Division to press the cause of its unnamed members.

The Division has argued that the abortion decision is a personal moral choice that each pregnant woman must make for herself in light of her own individual conscience and circumstances and "the principle of responsible parenthood." See Opinion 192-197, 327. The only thread that unites the membership of the Women's Division on this subject is an avowed commitment to respect a diversity of views. In such a situation, the principles established in *Warth*, *Hunt*, and *Abington School District* are particularly compelling. The association should not be permitted to assert its members' interest in a matter of personal moral choice.

2. Assuming that appellees' free exercise argument is properly presented in this case, it should be rejected because the Constitution does not require the government to subsidize the exercise of First Amendment rights. Similarly, the Fifth Amendment does not require the use of public funds to support every activity comprehended within the "liberty" protected by the Due Process Clause.

The Free Exercise Clause of the First Amendment guarantees the right to practice one's religion without government interference. This does not mean that the government must bear the cost of each person's religious observances.[19] This Court has never required the government to expend public funds in order to

[19] Indeed, the Court has upheld secular laws that have the incidental effect of making some forms of religious observance more expensive than others. See *McGowan* v. *Maryland*, *supra*; *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). See especially *id.* at 605-606 (plurality opinion).

enable indigent persons to engage in whatever constitutionally protected activity they choose. On the contrary, the Court has recognized numerous constitutional rights for which public financial assistance need not be provided. For example, in *Maher* v. *Roe*, *supra*, the Court observed that, although the Constitution protects the right to travel interstate, it does not obligate the government to pay the bus fares of indigent travelers. 432 U.S. at 474-475 n.8. By the same token, although the Court has sustained parents' right to select private rather than public school education for their children, it has rejected the argument that a state violates that right if it chooses to fund public but not private education. *Id.* at 476-477; *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973).[20]

[20] Additional examples are not difficult to find. The First Amendment protects the freedom of speech and the freedom of the press, as well as the free exercise of religion, yet it would be foolish to suggest that the constitutionally guaranteed rights to speak and publish entail a corresponding entitlement to federal financial assistance to support those activities. Cf. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion). Similarly, this Court has recognized a constitutionally protected right to use contraceptives, but the existence of that right does not require public funding to aid its exercise.

The logic of the First Amendment portion of the district court's opinion, it should be noted, would apply equally even if the Medicaid Act had never been passed. If Congress infringes appellees' free exercise rights by refusing to pay for medically necessary abortions, that refusal would offend the First Amendment no less if Congress also refused to pay for other medically necessary services. The district court's decision, therefore, apparently holds that the Constitution requires public funding of medically necessary abortions, even

This reasoning applies with even greater force when the constitutional right involved is the right to the free exercise of religion. If the government must provide publicly funded abortions so that indigent women may act in accordance with their religious beliefs, there is no principled reason why it should not also be required to distribute Bibles and other religious materials at public expense, in order to assist poor persons in their religious devotions. Such efforts surely would run afoul of the Establishment Clause and therefore are not compelled by the Constitution.

The Hyde Amendment does not preclude or interfere with "individual decisions of religiously formed conscience to terminate pregnancy for medical reasons." It simply prohibits the use of federal Medicaid funds for such abortions, unless a continuation of pregnancy would endanger the life of the mother. Pregnant women are neither barred from nor penalized for acting in accordance with their religious beliefs. The Hyde Amendment therefore does not violate the Free Exercise Clause of the First Amendment or the Due Process Clause of the Fifth Amendment.

---

if Congress provides no other medical services for indigents. This result is inconsistent with *Maher* v. *Roe*, *supra*, in which the Court declared that "[t]he Constitution imposes no obligation on the States [or the federal government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents" (432 U.S. at 469).

CONCLUSION

The judgments of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

PETER BUSCEMI
Assistant to the Solicitor General

ELOISE E. DAVIES
Attorney

MARCH 1980

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 109 of the Joint Resolution making further continuing appropriations for the fiscal year 1980, and for other purposes, Pub. L. No. 96-123, 93 Stat. 926, provides in pertinent part:

> Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service * * *.

Section 210 of the Act Making Appropriations for the Departments of Labor and Health, Education, and Welfare, and Related Agencies for the fiscal year

ending September 30, 1979, and for other purposes, Pub. L. No. 95-480, 92 Stat. 1586, provides in pertinent part:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Section 209 of the Act Making Appropriations for the Departments of Labor and Health, Education, and Welfare, and Related Agencies, for the fiscal year ending September 30, 1977, and for other purposes, Pub. L. No. 94-439, 90 Stat. 1434, provides:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 316264 481

FOR ARGUMENT

Supreme Court, U.S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

CORA MCRAE, ET AL.,
Appellees.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

JANET BENSHOOF
JUDITH LEVIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

HARRIET PILPEL
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022

EVE PAUL
Planned Parenthood Federation
of America
810 Seventh Avenue
New York, New York 10019

RHONDA COPELON
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

SYLVIA LAW
New York University School of Law
40 Washington Square South
New York, New York 10012

ELLEN K. SAWYER
Corporation Counsel of the City
of New York
Municipal Building
New York, New York 10007

Attorneys for the Appellees

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
A. History of the Legislation	5
B. History of the Litigation	8
C. Facts	12
1. Introduction	12
2. Implementation of the Hyde Amendment Resulted in States Adopting the Hyde Standard or a Similar Standard for Medicaid Abortions	13
3. The Impact of the Hyde Amendment Has Been to Limit Medicaid Abortions, in a Random Manner, to Only 1% of Those Poor Women Who Obtained Them Prior to Its Implementation	20
4. Plaintiff Class Members, for Whom Abortion Is Medically Necessary, Have Suffered Increased Health Risks Because of the Hyde Amendment	22

PAGE

5. The Hyde Amendment Standard Does Not Cover the Vast Majority of Medical Problems Which May Make Abortion Medically Necessary 26
   a. Physical Factors Cause High Risk Pregnancies 27
   b. Emotional and Psychological Factors Cause High Risk Pregnancies 32
   c. Most Pregnancies Caused by Rape and Incest Are Not Covered by the Hyde Amendment 38
   d. Familial Considerations, Including the Effect of Diagnosed Fetal Deformities, May Make Abortion Medically Necessary 39
   e. Poverty Is an Additional Factor Which May Be Medically Significant 44
   f. Teenage Pregnancy and Childbearing Pose Significant Risks 45
6. The Hyde Amendment Is Impossible for Physicians to Apply, and Precludes the Exercise of Medical Judgment 50
   a. It Is Not Possible to Know Early in Pregnancy Whether a Woman's Life Will Be Endangered 52

PAGE

   b. The Hyde Amendment Standard Is Alien to Good Medical Practice and Has Inhibited Doctors' Treatment of Medicaid-Eligible Women 57
7. The "Medically Necessary" Standard Is Understood by the Medical Profession 60
8. There Are No Alternatives for Poor Women Who Need Medically Necessary Abortions 61
9. Abortion Is a Matter of Religious and Conscientious Belief, as to Which Religions Are Deeply and Irreconcilably Divided 66
   a. Theological Positions Opposed to Abortion 68
   b. Theological Postions Viewing the Abortion Right as a Matter of Religious Liberty 72
   c. Dissent Within the Denominations 79
10. The Legislative History of the Hyde Amendments Demonstrates the Theological Division and the Congressional Purpose to Prefer the Anti-Abortion Belief 81
   a. The Sequence of Hyde Amendments Reflects an Effort to Enact the Religious Doctrine That Condemns Abortion 81

PAGE

b. The Legislative Debates Illustrate That the Hyde Amendment Was a Product of Religious Belief and Pressures Against Abortion 83

11. The Opposition to Abortion Which Produced the Hyde Amendments is Pervasively Religious in Character 92

a. The Roman Catholic Church Has Spearheaded an Extensive Political Mobilization to Enact Their Religious Doctrine Against Abortion into Civil Law 92

b. The Record Demonsrates the Religious Themes and the Absence of a Secular Interest or Constituency in the So-Called "Right-to-Life" Movement 96

12. The Fabric of Our Society Is Increasingly Threatened by the Religious Mobilization Against Abortion 100

SUMMARY OF ARGUMENT 107

ARGUMENT:

I. TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES STATES TO FUND MEDICALLY NECESSARY PHYSICIAN AND HOSPITAL SERVICES, INCLUDING ABORTION SERVICES, AND PROHIBITS EXCLUSIONS BASED ON DIAGNOSIS 112

PAGE

II. THE HYDE RIDERS' AFFIRMATIVE EXCLUSION OF MEDICALLY NECESSARY ABORTIONS FROM A PROGRAM PROVIDING OTHERWISE COMPREHENSIVE ENTITLEMENT TO MEDICALLY NECESSARY SERVICES RAISES CONSTITUTIONAL ISSUES CRITICALLY DIFFERENT FROM THOSE RESOLVED IN MAHER V. ROE 113

A. The Hyde Restrictions Impinge Upon Important Interests of Patients and Physicians 116

B. The Hyde Restriction Places Enormous Burdens Upon Poor Women and Their Physicians 121

C. The Nature of the Group Burdened by the Riders Suggests the Need for Careful Constitutional Consideration ... 124

D. No Legitimate Purpose Is Served by the Hyde Restriction 128

E. The Actual Purpose of the Hyde Restriction Is to Penalize the Exercise of Constitutional Rights 134

III. THE HYDE EXCLUSION CREATES A CLASSIFICATION THAT VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAW 137

PAGE

IV. THE HYDE EXCLUSION PENALIZES VULNERABLE CITIZENS, FAILS TO MEET MINIMAL STANDARDS OF FUNDAMENTAL FAIRNESS AND HENCE DENIES DUE PROCESS OF LAW 139

V. THE HYDE AMENDMENT IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS 142

VI. THE HYDE AMENDMENTS ARE INVALID UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT ... 151

A. The Right to Make and Effectuate a Conscientious Decision About Abortion is Protected by the Free Exercise Clause of the First Amendment 152

B. The Hyde Amendments Impermissibly Burden the Free Exercise of Those Whose Religious and Conscientious Convictions Counsel Consideration of Abortion 156

1. The Hyde Amendments Severely Burden Religious and Conscientious Determinations Regarding Childbearing 157

2. The Hyde Amendments Discriminatorily Burden Women For Whom Abortion Is a Decision of Conscience 160

PAGE

C. The Hyde Amendment Must Be Invalidated Because There Is No Substantial Purpose Justifying the Discriminatory Burden On The Abortion Decision 162

VII. THE HYDE AMENDMENTS VIOLATE THE FIRST AMENDMENT'S PROHIBITION ON LAWS RESPECTING ESTABLISHMENT OF RELIGION 166

A. The Hyde Amendments Have No Clear Secular Purpose 168

B. The Hyde Amendment Has A Primary Effect of Advancing One Religious Belief and Inhibiting Opposing Religious and Non-Religious Belief and Practice 177

C. The Riders Compel And Invite Excessive Entanglement Of Government And Religion 181

CONCLUSION 186

Appendix A, Description of Witnesses 1a

Appendix B, Federal Statutes 9a

Appendix C, Federal Regulations 10a

PAGE

TABLE OF AUTHORITIES

Cases:

Autenreith v. Gullen, 418 F. 2d 586 (9th Cir.), *cert. denied*, 397 U.S. 1036 (1969) 164

Beal v. Doe, 432 U.S. 438 (1977) 11, 13, 60, 115

Bellotti v. Baird ___ U.S. ___ 99 S.Ct. 3035 (1979) 117

Bellotti v. Baird, 428 U.S. 132 (1976) 108, 122, 123

Board of Education v. Allen, 392 U.S. 236 (1968) 169

Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976) 109, 131, 136

Braunfeld v. Brown, 366 U.S. 599 (1961) 159, 160

Califano v. Jobst, 434 U.S. 47 (1977) 121

Califano v. Wescott, ___ U.S. ___ 99 S. Ct. 2655 (1979) 123, 127

Carey v. Population Services International, 431 U.S. 678 (1977) 109, 118, 119, 122, 141

Carrington v. Rash, 380 U.S. 89 (1965) 139

Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974) 162

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 108, 125, 137, 139, 140, 142

Colautti v. Franklin, 439 U.S. 379 (1979) 107, 110, 117, 118, 123, 147, 149

PAGE

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 111, 168, 169, 176, 177, 179, 183

Committee to Defend Reproductive Rights v. Cory, S.F. No. 24053 (Cal. Sup. Ct., Sept. 20, 1979) 19

Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass, 1976) 145

Connally v. General Construction Co., 269 U.S. 385 (1926) 147

Connecticut v. Menillo, 423 U.S. 9 (1975) 117

Craig v. Boren, 429 U.S. 190 (1976) 128

Dandridge v. Williams, 397 U.S. 471 (1970) 133, 138

Doe v. Bolton, 410 U.S. 179 (1973) 7, 60 113, 117

Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979) 19

Doe v. Kenley, 584 F. 2d 1362 (4th Cir. 1978) 21

Doe v. Klein, No. 76-74 (D. N.J. Feb.. 2, 1976) (order granting preliminary injunction) (D. N.J. June 27, 1977) (order dissolving preliminary injunction), *aff'd* No. 77-2026 (3d Cir. Jan. 10, 1978) 13, 15

Doe v. Myatt, No. A3-74-48 (D.N.D., Jan. 10, 1975)(Oct. 30, 1976) 13

Doe v. Percy, 476 F. Supp. 324 (W.D. Wisc. 1979) 20

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971). 150

PAGE

Dombrowski v. Pfister, 380 U.S. 479 (1965)..... 147

Douglas v. California, 372 U.S. 353 (1963)..... 139

D.R. v. Mitchell, No. 78-1675 (10th Cir. March 10, 1980).....19, 112, 124

Dunn v. Blumstein, 405 U.S. 330 (1972)..... 121

Eisenstadt v. Baird, 405 U.S. 438 (1972)..122, 131, 140

Elrod v. Burns, 427 U.S. 347 (1976).....111, 158

Emma G. v. Edwards, No. 77-1342-B (E.D. La. Nov. 27, 1978)..... 19

Engel v. Vitale, 370 U.S. 421 (1962).....111, 170, 178, 179, 180, 181, 183

Epperson v. Arkansas, 393 U.S. 97 (1968).....111, 166, 168, 169, 170, 173

Estelle v. Gamble, 429 U.S. 97 (1975)..... 120

Everson v. Board of Education, 330 U.S. 1 (1947).....160, 168, 177, 182

Floyd v. Anders, 440 F.Supp. 535 (D. S.C. 1977) (three judge court) *remanded* 440 U.S. 445 (1979) (*per curiam*)..... 144

Follett v. Town of McCormick, 321 U.S. 573 (1944)..... 159

Fowler v. Rhode Island, 345 U.S. 67 (1953).....161, 163

Geduldig v. Aiello, 417 U.S. 484 (1974)..... 127

General Electric v. Gilbert, 429 U.S. 125 (1976). 126, 127

PAGE

Gillette v. United States, 401 U.S. 437 (1971).154, 160, 163, 164

Goesart v. Cleary, 335 U.S. 464 (1948)..... 128

Haring v. Blumenthal, 471 F.Supp. 1172 (D.D.C. 1979)..... 162

Hodgson v. Board of County Commissioners, 3 Medicare & Medicaid Guide (CCH) ¶30,159 (8th Cir. Jan. 9, 1980)..... 19

Hoyt v. Florida, 368 U.S. 57 (1961)..... 128

Idaho Department of Employment v. Smith, 434 U.S. 100 (1977)..... 134

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).....174, 178, 180, 181, 182

Jacobson v. Massachusetts, 197 U.S. 11 (1905)120, 163

James v. Strange, 407 U.S. 128 (1972)..... 139

Jefferson v. Hackney, 405 U.S. 535 (1972)..... 134

Jones v. Wolf,____U.S.____99 S. Ct. 3020 (1979)..... 182

Kahn v. Shevin, 416 U.S. 351 (1974)..... 134

Keyishian v. Board of Regents, 385 U.S. 589 (1967)..... 147

Kramer v. Union Free School District, 395 U.S. 621 (1969)..... 138

Lanzetta v. New Jersey, 306 U.S. 451 (1939)..... 147

Lemon v. Kurtzman, 403 U.S. 602 (1971).....111, 169, 181, 183, 184

PAGE

Loving v. Virginia, 388 U.S. 1 (1967) 133

McDaniel v. Paty, 435 U.S. 618 (1978) 153, 162, 168

McGowan v. Maryland, 366 U.S. 420 (1961) 168, 169, 170, 171, 172

Maher v. Roe, 432 U.S. 464 (1977) ..... *Passim*

Marbury v. Madison, 1 Cranch 137 (1803) 131

Marston v. Lewis, 410 U.S. 679 (1973) *121*

Meek v. Pittenger, 421 U.S. 349 (1975) 169, 183, 184

Memorial Hospital v. Maricopa, 415 U.S. 250 (1974) 108, 119

Meyer v. Nebraska, 262 U.S. 390 (1923) 140

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 136

Muller v. Oregon, 208 U.S. 412 (1908) 128

Murdock v. Pennsylvania, 319 U.S. 105 (1943) ... 158, 159, 160, 164

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 158

Nashville Gas Company v. Satty, 434 U.S. 136 (1977) 108, 115, 125, 126, 142

New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) 123, 132

Niemotko v. Maryland, 340 U.S. 268 (1951) 161, 164

Orr v. Nebraska Department of Public Welfare, No. 80-031 (D. Neb. Jan. 25, 1980) 20, 144

PAGE

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 147

People v. Belous, 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied* 397 U.S. 915 (1970) 150

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 140

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 110, 117, 148

Planned Parenthood Affiliates v. Rhodes, 477 F. Supp. 529 (S.D. Ohio, 1979) 20

Poe v. Ullman, 367 U.S. 497 (1961) 139

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) 182

Preterm, Inc. v. Dukakis, 591 F. 2d 121 (1st Cir. 1979), *cert. den. sub nom Preterm, Inc. v. King*____U.S.____99 S. Ct. 2182 (1979) 19

Prince v. Massachusetts, 321 U.S. 158 (1944) 163

Dr. Pablo Quiroga v. Medical Practice Board, et al., No. 77-20461-AA (Cir. Ct., Cty. of Ingram, Mich. filed 1977) 145

Reed v. Reed, 404 U.S. 71 (1971) 128

Reproductive Health Services v. Freeman, 3 Medicare & Medicaid Guide (CCH) ¶30,160 (8th Cir., Jan. 9, 1980) 20, 115, 124, 125

Reynolds v. United States, 98 U.S. 244 (1878) 163

Richardson v. Belcher, 404 U.S. 78 (1971) 134

PAGE

Right to Choose v. Byrne, 398 A.2d 587 (N.J. Super. Ct. 1979) 20

Rinaldi v. Yeager, 384 U.S. 305 (1966) 139

Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) .. 20

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd. on other grounds*, 410 U.S. 113 (1973) ..... *Passim*

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 137

Salyer Land Company v. Tulare Water District, 410 U.S. 719 (1973) 138

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 124, 138

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 168, 169, 170, 171, 172, 174, 176, 178, 179, 180, 182, 183

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 140

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 167, 191

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 181

Shapiro v. Thompson, 394 U.S. 618 (1969) 109, 135

Sherbert v. Verner, 374 U.S. 398 (1963) 110, 156, 157, 158, 159, 160, 163

Smith v. Ginsberg, No. 75-0380 CH (S.D. W. Va. May 9, 1978) 20

Speiser v. Randall, 357 U.S. 513 (1958) 158

PAGE

State v. Munson, 86 S.D. 663, 201 N.W. 2d. 123 (1972) 145

Taylor v. St. Vincent's Hospital, 523 F.2d 75 (4th Cir. 1975), *cert. denied* 424 U.S. 948 (1976) 162

Tilton v. Richardson, 403 U.S. 672 (1971) 169

Torcaso v. Watkins,367 U.S. 488 (1961) 153

Turner v. Department of Employment Security, 423 U.S. 44 (1975) 126

United States v. Ballard, 322 U.S. 78 (1944) 171, 182

United States v. Carolene Products, 304 U.S. 144 (1938) 125

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 109, 134, 135

United States v. Harris, 347 U.S. 612 (1954) 147

United States v. Jackson, 390 U.S. 570 (1968) ... 135

United States v. Kauten, 133 F.2d 703 (2d Cir. 1943) 154

United States v. Macintosh, 283 U.S. 605 (1931) 154

United States v. O'Brien, 391 U.S. 370 (1968) 175

United States v. Seeger, 380 U.S. 163 (1965) ...110, 154, 155, 161, 164

United States v. Vuitch, 402 U.S. 62 (1971) 110, 147, 148

Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977) ... 136

PAGE

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 136

Vlandis v. Kline, 412 U.S. 441 (1973) 138

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) 161, 168, 173, 178, 180, 183

Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972) 137

Weinberger v. Salfi, 422 U.S. 749 (1975) 109, 136

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) .. 134

Welsh v. United States, 398 U.S. 333 (1970) 154, 161

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 164

Whalen v. Roe, 429 U.S. 589 (1977) 136

Williams v. Rhodes, 393 U.S. 23 (1968) 138

Williamson v. Lee Optical Company, 348 U.S. 483 (1955) 119

Wisconsin v. Yoder, 406 U.S. 205 (1972) 110, 153, 157, 163

Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) 162

Wolman v. Walter, 433 U.S. 229 (1977) 169, 171

Women's Health Services, Inc. v. Maher, Civ. No. H-79-405 (D. Conn., Jan. 7, 1980) 19, 24, 26

Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *aff'd in part and remanded* 428 U.S. 106 (1976) 13

PAGE

Wyman v. Rothstein, 398 U.S. 275 (1970) 134

Zablocki v. Redhail, 434 U.S. 374 (1978) 108, 109 121, 122, 137, 140, 142

Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979), *appeal granted, juris postponed, Williams v. Zbaraz*, 79-4, 79-5, 79-491 (1979) 19

Zorach v. Clauson, 343 U.S. 306 (1952) 178

Statutes

18 U.S.C. §286 145

18 U.S.C. §287 145

18 U.S.C. §1001 145

42 U.S.C. §§300a 7-8 162

42 U.S.C. §1395 145

42 U.S.C. §1396 4

42 U.S.C. §1396f 151

42 U.S.C. 1396h(a) 145

Pub. L. No. 94-439, §209, 90 Stat. 1434 (1976) ... 2, 4, 6

Pub. L. No. 95-205, §101, 91 Stat. 1460 (1977) ... 2, 4, 7

Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978) ... 2, 4, 7

Pub. L. No. 96-123, §109, 93 Stat. 126 (1979) 2, 4, 7

ALASKA STAT. §18.16.010(a) (Supp. 1979) 161

ARIZ. REV. STAT. ANN. §36-2151 (1974) 161

ARK. STAT. ANN. §41-2560 (1948, 1977) 161

CAL. HEALTH AND SAFETY CODE §§25955-25955.3 (West. Supp. 1979) 161

	PAGE
COLO. REV. STAT. §18-6-104 (1978)	161
DEL. CODE ANN. Tit. 24, §1791 (1975)	161
GA. CODE ANN. §26-1202(e) (1978)	161
HAW. REV. STAT. §453-16(d) (1976)	161
IDAHO CODE §18-612 (1979)	161
ILL. REV. STAT. ch. 91, §201 (1973)	161
ILL. ANN. STAT. ch. 38, §81-16-33 (Smith-Hurd, 1977)	161
IOWA CODE ANN. §146.1-.2 (West Supp. 1979)	161
KAN. STAT. §§65-443-444 (Supp. 1979)	161
KY. REV. STAT. ch. 311.800-.810 (1972, 1977)	161
LA. REV. STAT. ANN. Tit. 40, §§1299.31-.34 (West Supp. 1979)	162
MASS. ANN. LAWS ch. 112, §121 (Michie/Law Co-op Supp. 1980)	162
MD. CODE ANN. art. 43, §556E (Supp. 1979)	162
ME. REV. STAT. ANN. Tit. 22 §1592 (Supp. 1979)	162
MICH. COMP. LAW ANN. §§333.20182-.20184 (1978)	162
MINN. STAT. ANN. §§145.414, .42, .925 (West Supp. 1979)	162
MO. ANN. STAT. ch. 197.032 (Vernon Supp. 1980)	162
MONT. REV. CODES ANN. Tit. 94-5-620 (1977)	162

	PAGE
NEB. REV. STAT. §§28-4,156 to -160 (1975)	162
NEV. REV. STAT. §632.475 (1977)	162
N.J. STAT. ANN. Tit. 2A: 65A-1 to -2 (West Supp. 1979)	162
N.M. STAT. ANN. §30-5-2 (1978)	162
N.Y. CIV. RIGHTS LAW §79-i (McKinney 1976)	162
N.C. GEN. STAT. §14-45.1(f) (Supp. 1979)	162
N.D. CENT. CODE §14-02.1-03(3) (Supp. 1979)	162
OHIO REV. CODE ANN. §4731.91 (Page, 1977)	162
OKLA. STAT. ANN. Tit. 63, §1-741 (West Supp. 1979)	162
OR. REV. STAT. §435.485 (1977)	162
PA. CONS. STAT. ANN. Tit. 43, §955.2 (Purdon Supp. 1979)	162
R.I. GEN. LAWS §23-17-11 (1979)	162
S.C. CODE §44-41-50 (1976)	162
S.D. COD. LAWS §34-23A-12 to -14 (1977)	162
TENN. CODE ANN. §39-304-305 (1975)	162
REV. TEX. CIVIL STAT. ANN., art. 4512.7 (Vernon Supp. 1979)	162
UTAH CODE ANN. §76-7-306 (1978)	162
VA. CODE §18.2-75 (1975)	162
WASH. REV. CODE ANN. §9.020.080 (1977)	162
WISC. STAT. ANN. §140.42 (West 1974)	162
WYO. STAT. ANN. §35-6-106 (1977)	162

PAGE

Rules, Regulations

21 C.F.R. §310.502 (1977) 30

21 C.F.R. §801.427 (1977) 30

42 C.F.R. §50.304 (1978) 144

42 C.F.R. §441.205(a)(3) (1978) 38

42 C.F.R. §455.12 et seq. (1979) 145

43 Fed. Reg. 31868 (1978) 19

43 Fed. Reg. 4570 (1978) 144

43 Fed. Reg. 4832 (1978) 146

Other Authorities

122 Cong. Rec. (daily ed. June 28, 1976), S10806-S10807 82

122 Cong. Rec. (daily ed. Aug. 10, 1976), H8633-H8634 82

123 Cong. Rec. (daily ed. June 17, 1977), H6082-H6097 ..... 85, 86, 87, 88, 89, 90, 91

123 Cong. Rec. (daily ed. June 29, 1977), S11030-S11056 ..... 85, 86, 87, 88, 89, 91

123 Cong. Rec. (daily ed. Sept. 27, 1977), H10133-H10134 ..... 22, 85, 87

123 Cong. Rec. (daily ed. Oct. 12, 1977), H10831-H10836 ..... 86, 87, 88, 89, 90, 91

123 Cong. Rec. (daily ed. Oct. 13, 1977), H10969 ..... 85, 87

PAGE

123 Cong. Rec. (daily ed. Nov. 3, 1977), H12171-H12174, S18582-S18583 ..... 86, 87, 89, 90, 91

123 Cong. Rec. (daily ed. Nov. 29, 1977), H12489-H12491 ..... 22, 91

123 Cong. Rec. (daily ed. Dec. 7, 1977), H12771-H12773, S19439 ..... 90, 91

Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 93rd Cong., 2d Sess., on S.J. Res. 119 and S.J. Res. 130, Vol. I 70, 71, 72, 93

Note, *"Women's Right, Physician's Judgement: Commonwealth v. Edelin and a Physician's Criminal Liability for Fetal Manslaughter,"* *4 Women's Rights L. Rptr. 97 (1978).* *145*

Gordon, L., *Woman's Body, Woman's Right: A Social History of Birth Control in America* (Viking, 1976) 173

Mohr, R., *Abortion in America* (Oxford, 1978) 173

Tillich, P., *The Shaking of the Foundations* 57 (1948) 155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

—v.—

CORA MCRAE, ET AL.,

Appellees.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York of January 15, 1980 is not yet reported. See Motion of Defendant-Appellant to Dispense with Printing of the District Court's Opinion and the Accompanying Annex.

JURISDICTION

This is a civil proceeding to which the United States is a party and in which a series of Acts of Congress have been held unconstitutional: Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-123, § 109, 93 Stat. 126 (1979). The final judgment of the District Court was entered on January 15, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1252. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of New York on January 15, 1980 by the Defendant-Appellant, the Secretary of the Department of Health, Education and Welfare, and by the intervening Defendants-Appellants James L. Buckley, Jesse Helms, Henry T. Hyde, and Isabelle M. Pernicone on January 26, 1980. On February 5, 1980, Plaintiffs-Appellees moved this Court to hear arguments in tandem with *Williams v. Zbaraz*, 79-4, 79-5, 79-491. On February 11, 1980, Defendants-Appellants moved this Court for a stay of the District Court judgment pending appeal. On February 19, 1980, this Court denied Appellants' Motion, granted jurisdiction (79-1268), and ordered that this case be heard in tandem with *Williams v. Zbaraz,* 79-4, *Miller v. Zbaraz,* 79-5, and *United States v. Zbaraz,* 79-491. (A.332)

QUESTIONS PRESENTED

1. Does the Hyde Amendment violate the Due Process Clause of the Fifth Amendment?

a. Does the Hyde Amendment violate equal protection guarantees by excluding virtually all medically necessary abortions from a program that reimburses for all other medically necessarv services?

b. Does the Hyde Amendment interfere with and penalize the liberty to protect one's health in the abortion context?

c. Is the Hyde Amendment void for vagueness?

2. Does the Hyde Amendment violate the Free Exercise Clause of the First Amendment as well as the Due Process Clause of the Fifth Amendment by infringing on the right of poor women to make conscientious decisions with their physicians, that abortions are necessary to their health?

3. Does the Hyde Amendment violate the Establishment Clause of the First Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States:

> No person . . . shall be deprived of life, liberty or property without due process of law.

2. The Social Security Act, 42 U.S.C. § 1396 (1976); 1396a(a) (1976); 1396b(a) (1976), *as amended by* Pub. L. No. 95-142, §§ 10(a), 17(a), 91 Stat. 1175 (1977); 1396b(p) (1976) *as amended by* Pub. L. No. 95-142, § 11(a), 91 Stat. 1175 (1977); 1396(d)a (1976), *as amended by* Pub. L. No. 95-210, § 2(a), 91 Stat. 1485 (1977); 1396f.

3. The Hyde Amendments: Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-123, § 109, 93 Stat. 126 (1979).

STATEMENT OF THE CASE

A. History of the Legislation

Harris v. McRae is a challenge to riders to the Labor-HEW Appropriations Act, generally known as "Hyde Amendments," which have been enacted annually since 1976. For four years the question of federal funding of abortions for poor women under Medicaid and other programs has been the subject of much Congressional debate. Each year the question of federal abortion funding has held hostage the annual HEW-Labor budgets.

The rider passed in 1976 to the Fiscal Year 1977 Act[1] was enacted over the President's veto on the last day of fiscal year 1976. The Conference Report, reached after four grueling sessions and finally adopted by both houses, provided that:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term. It is the intent of the conferees to limit the financing of abortion under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions performed as a method of family planning or for emotional or social convenience. It is not our intent to preclude payments for abortions when the

[1] The riders will be referred to herein as FY 77-FY 80, reflecting not the year of their enactment but the budgetary year to which they apply, *e.g.*, the 1976 enactment will be referred to as the 1977 Hyde Amendment.

life of the woman is clearly endangered, as in the case of multiple sclerosis and renal disease, if the pregnancy were carried to term; nor is it the intent of conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

The 1978 Hyde Amendment passed December 7, 1977 after almost six months of debate.[2] The compromise finally enacted contained three exceptions:

> None of the funds provided for in this paragraph shall be used to perform abortions except where the *life of the mother would be endangered* if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, where such *rape* or *incest* has been reported promptly to a law enforcement agency or public health service; or except in those instances where *severe and long-lasting physical health damage to the mother* would result if the pregnancy were carried to term when so determined by two physicians. Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the

[2] Following the initial House and Senate floor votes, the 1978 rider was the subject of seven conference committee sessions, nine House floor debates, ten Senate floor debates, and 27 floor votes. *See McRae v. Harris*, No. 76-C-1804 (E.D.N.Y., Jan. 15, 1980) Slip op. at 26 (hereinafter "Slip op."). A copy of legislative history is being lodged for the convenience of the Court.

> termination of an ectopic pregnancy. The Secretary shall promptly issue regulations and establish procedures to insure that the provisions of this section are rigorously enforced. (Emphasis added.) Pub. L. 95-205, § 101, 91 Stat. 1460 (1977).

The 1979 Rider, Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586, was identical.

The current Hyde Amendment, passed November 20, 1979 eliminated the severe and long-lasting health damage exception. Pub. L. No. 96-123, § 109, 93 Stat. 926.

The trial court found that the purpose of the Amendments was, simply, to prevent abortions. Slip op. at 165. The Amendments' proponents sought to nullify *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), to the extent legislatively possible because they viewed abortion as the "taking of human life, and, therefore, not debatable." [3] Slip op. at 164. Appropriations riders were used because "efforts to bring the abortion issue to debate on a proposed constitutional amendment had failed." [4] Slip Op. at 21.

Moreover, the court found that the restrictions of the Amendments reflect a compromise "negotiated across an unbridgeable gulf of principle" (slip op. at 165), exacted only because of the tremendous pressure

[3] The trial court made extensive findings of fact on the legislative history and purpose of the Hyde Amendment. Slip op. at 16-43.

[4] Hearings on proposed "Human Life Amendments" were held by the Judiciary Committee of both Houses in 1975. Both Committees refused to approve an amendment for consideration by their respective bodies.

created by the need for the annual budgets. Slip op. at 278. "[T]he amendments are enactments of the House of Representatives to which the Senate has acceded, with such amendments as it could negotiate, rather than risk the appropriations bills." Slip op. at 279.

As such, the meager exemptions extracted each year disregard both the medical realities of pregnancy and professional standards of medical care.

In addition to the health issues, pro-choice legislators repeatedly asserted the constitutional and conscientious nature of the abortion right and the intolerability of imposing upon poor women the religious, moral view that condemns abortion. Their "every argument was met with the assertion that the fetus was inviolable human life, that there was nothing to discuss." Slip op. at 274.

B. History of the Litigation

Harris v. McRae is a class action filed October 1, 1976 seeking declaratory and injunctive relief against the Secretary of the Department of Health, Education and Welfare (hereinafter "HEW") to prevent implementation of the 1977 Hyde Amendment. Plaintiffs have amended the complaint to challenge the 1978, 1979, and 1980 "Hyde Amendments." [5] (A.58-80; A.90; A.95.)

[5] The following designations are used to refer to the documents filed with this Court in this litigation: "A."—Appendix; "R."—Record item (numbered according to the list of items transmitted to this Court by the district court on March 21, 1980; "Pl. Exh./T." refers to the transcript page at which the document was admitted in evidence. No transcript reference is available for Plaintiffs' Exhibits 8a, 200-290, which were put into evidence on August 2 and 3, 1978, or for Plaintiffs' Exhibits 300-471, which were admitted by Court Order on February 14, 1980. (A.96-97.) Plaintiffs have lodged for the convenience of the Court state laws and policies enacted pursuant to the Hyde Amendments (Vol. I), critical medical articles placed in evidence (Vol. II), legislative history (Vol. III), and key religious documents (Vol. IV).

Plaintiffs-appellees include:

(1) CORA McRAE, from New York, and four anonymous Medicaid-eligible women from Connecticut and Minnesota who were denied Medicaid reimbursement for abortions even though their doctors concluded that their abortions were medically necessary because of physical and mental health indications. They represent a certified nationwide class of indigent pregnant women seeking abortions which their doctors consider medically necessary.[6]

(2) DRS. IRWIN B. TERAN, JANE HODGSON, DAVID B. BINGHAM, HUGH SAVAGE, EDGAR W. JACKSON, and LEWIS H. KOPLIK, physicians from New York, Connecticut, Texas, New Mexico and Georgia, who would be willing to perform medically necessary abortions for indigent pregnant women but for the absence or threatened absence of Medicaid reimbursement because of the Hyde Amendment. They represent a nationwide class of such providers.

(3) The WOMEN'S DIVISION OF THE BOARD OF GLOBAL MINISTRIES OF THE UNITED METHODIST CHURCH and two officers, on behalf of themselves and their membership, among whom are

[6] The October 22, 1976 decision certified plaintiffs' classes of indigent eligible women and abortion providers and permitted intervention as defendants by Isabelle E. Pernicone as *guardian ad litem* and by Senators Buckley and Helms and Congressman Hyde as taxpayers. *See McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). The classes were recertified on January 29, 1979, and in the final judgment of the Court. (A.92-94; A.86-87.)

indigent pregnant women who are dependent on Medicaid to obtain safe abortions which are medically necessary and who object to the imposition on them of religious beliefs about abortion which they do not share, thereby preventing exercise of their freedom of conscience.

(4) PLANNED PARENTHOOD OF NEW YORK CITY (PPNYC), a not-for-profit New York corporation providing family planning services and first trimester abortions at state licensed clinics. The Hyde Amendments have placed their receipt of state and local funds for medically necessary abortions in jeopardy.

(5) The NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (NYCHHC), is a public benefit corporation charged with the responsibility for providing comprehensive health and medical services to the residents of New York City. The NYCHHC operates 18 municipal hospitals, 12 of which perform abortions. As the largest single provider of medically necessary abortions to indigent pregnant women in New York City, the NYCHHC appears to defend its fiscal interest in reimbursement for these abortions to preserve its overall economic capacity to render adequate medical care to all its patients.[7]

The district court issued a preliminary injunction preventing implementation of the original Hyde Amendment. *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). On June 29, 1977, this Court vacated that judgment and remanded the case to the district

[7] *New York City Health and Hospitals Corporation v. Mathews*, No. 76-C-1805, was simultaneously filed and proceeded as a companion case to *McRae*. The two cases have been informally consolidated for this Court's review.

court for reconsideration in light of *Beal v. Doe*, 432 U.S. 438 (1977), and *Maher v. Roe*, 432 U.S. 464 (1977). (R.56.)

On August 4, 1977, the district court vacated its order and HEW immediately implemented the 1977 Hyde Amendment. Evidentiary hearings began on August 3, 1977, and continued intermittently for over a year.

On January 15, 1980, the district court held the Hyde Amendment unconstitutional under the Fifth and First Amendments and ordered HEW to fund all medically necessary abortions. (R.219, A.86.) A stay of the injunction was ordered for 30 days.[8] (R.220.) On February 19, 1980, this Court noted probable jurisdiction, denied defendant's and defendants-intervenors' motion for a stay, and granted plaintiffs' motion to hear argument in tandem with *Williams v. Zbaraz*, No. 79-4; *Miller v. Zbaraz*, No. 79-5; *United States v. Zbaraz*, No. 79-491. *Harris v. McRae*, No. 79-1268. (A.332) Accordingly, on that date, defendant HEW sent a notice to all Regional Commissioners to inform states, medical providers, and recipients of the distict court's order and of the states' obligation to fund medically necessary abortions in their Medicaid programs.

[8] Judgments and orders of the district court of January 15, 1980 were appended to the Government's Application for a Stay of the Judgment of the District Court Pending Appeal.

C. Facts

1. Introduction

On remand, the district court made extensive findings of fact, based largely on undisputed evidence. Plaintiffs presented over 30 witnesses, including acknowledged medical experts and theologians. A description of these witnesses is included in the appendix at the end of plaintiffs' brief. Nearly 500 exhibits, including official HEW documents and unpublished studies and data, were introduced into evidence.

Plaintiffs introduced evidence on the meaninglessness of the "life-endangering and severe and long-lasting physical health damage" standards of the Hyde Amendments in the context of the medical realities of pregnancy. Plaintiffs' proof further addressed the religious nature of the abortion decision, the irreconcilable religious differences over abortion, and the religiosity of the Hyde Amendments. Defendant HEW offered no medical or religious witnesses. Defendants-intervenors presented both medical and religious testimony, which the trial court found not inconsistent with plaintiffs' evidence. Slip op. at 99-100.

The findings of fact include the probable impact of the Hyde restrictions, as well as their actual impact where they have been implemented. The findings conclude that the Hyde Amendments were designed to prevent abortions, not to encourage normal childbirth or to fulfill any medical need, and that most women who need abortions to avert unacceptable health risks are not covered by the Amendments. Slip op. at 318, 322-23. Moreover, the trial court found the standards so vague and unworkable that even those women whose lives are in fact endangered are not receiving needed Medicaid abortions. Slip op. at 91, 110, 322-23.

2. Implementation of the Hyde Amendment Resulted in States Adopting the Hyde Standard or a Similar Standard for Medicaid Abortions.

When the Hyde Amendment first went into effect on August 4, 1977, virtually every state was funding all, or all medically necessary, abortions.[9]

The Court below found that ". . . the Hyde Amendment has precipitated changes in state law and Title XIX plans that depend for their validity on the validity of the challenged Amendments." Slip op. at 283.

Most states reacted in 1977 by restricting their own funding to the Hyde standard.[10]

---

[9] As of July 24, 1977, an informal state survey revealed that three states had already adopted restrictive policies similar to the Hyde Amendment, but were under court injunctions: Missouri, New Jersey, North Dakota. *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1976), *aff'd in part and remanded*, 428 U.S. 106 (1977) (this action was dismissed by plaintiffs, without prejudice, on July 1, 1977 as per *Beal v. Doe*, *supra*, and *Maher v. Roe*, *supra*); *Doe v. Klein*, No. 76-74 (D.N.J. Feb. 2, 1976) [preliminary injunction]; (D.N.J. June 27, 1977) [preliminary injunction dissolved in light of *Doe v. Beal, supra*] *aff'd* No. 77-2026 (3rd Cir., Jan 10, 1978); *Doe v. Myatt*, No. A3-74-48 (D.N.D., Jan. 27, 1975), (Oct. 30, 1976). Arizona is unaffected because it is the only state with no Medicaid program. *See* Janet Benshoof Aff., July 24, 1977. (R.48)

[10] *Alabama*: Special Alabama Medicaid Information Letter, FP-77-2 (August 25, 1977);

Arkansas: State of Arkansas, Dept. of Soc. and Rehabilitative Services, MSP-77-A/B-24 (August 8, 1977);

Connecticut: State of Connecticut, Dept. of Soc. Services, Health Services Bull. No. 58 (Aug. 19, 1977);

Delaware: Dept. of Health and Soc. Services, Release (August 5, 1977);

Florida: Florida Ad. Code, Emergency Rule 10-CER-77-36 (Amendment to State of Florida, Ad. Rules, Chapter 10C-738) (Sept. 1, 1977);

Georgia: GA. CODE ANN. § 96-4616 (1977) [state will not cover services for which it does not receive federal matching funds];

Some states could not choose to continue coverage since state law requires them to pay only for those

Indiana: Medicaid Division, State Dept. of Public Welfare, Memo (Aug. 9, 1977);
Kansas: State Dept. of Soc. and Rehabilitative Services, Secretary's L-192 (Dec. 1, 1977);
Kentucky: Bureau for Soc. Insurance, Dept. for Human Services, Hosp. Letter No. A-55, Phys. Letter No. A-56, Family Planning Letter No. A-3;
Louisiana: Office of Family Services, Dept. of Health and Human Resources, Physician Letter (Oct. 12, 1977);
Maine: Maine Dept. of Human Services, Revision of Medicaid Policy on Abortions, (Aug. 9, 1977);
Minnesota: Minn. Dep't of Public Welfare, Press Release (Sept. 23, 1977);
Mississippi: Mississippi Medicaid Commission, Memo, Restrictions on Medicaid Payment for Abortions (Aug. 8, 1977);
Montana: State of Montana, Economic Assistance Division, Soc. and Rehabilitation Services, Memo (Aug. 5, 1977);
Nebraska: Dept. of Public Welfare, Policy Statement (Sept. 1, 1977);
Nevada: State Welfare Assistance, State Assistance for the Medically Indigent (S.A.M.I.), Bull. No. 88;
New Mexico: Medical Assistance Manual § 319.2-0 (Oct. 1, 1977);
North Carolina: Division of Soc. Services, Dept. of Human Resources, Policy Statement (August 8, 1977);
North Dakota: Soc. Services Board, Memorandum, Oct. 20, 1977;
Ohio: Division of Medical Assistance, Dept. of Public Welfare, Medical Assistance Letter No. 64 (Sept. 8, 1977);
Oklahoma: State of Oklahoma Public Welfare Commission, Dept. of Institutions, Social and Rehabilitative Services Letter (June 2, 1978);
South Carolina: South Carolina Dept. of Soc. Services, Circular Letter No. 2320 (Aug. 18, 1977);
Tennessee: Dept. of Public Health, Official Notice (Aug. 9, 1977);
Texas: Texas Medical Assistance Program, Medicaid Bull. (Sept. 1977);
Utah: Office of Medical Services, Dept. of Soc. Services, Notice (Aug. 23, 1977);
Vermont: Agency of Human Services, Soc. Welfare Bull. No. 77-66 (Aug. 10, 1977);

services for which there is federal reimbursement.[11] Some adopted a facially more restrictive standard.[12] A few states continued to provide reimbursement at state expense for medically necessary abortions.[13] When the Hyde standard changed in 1978, many states changed along with it.[14]

Wyoming: State of Wyoming Division of Public Assistance & Soc. Services, Dept. of Health & Social Services, Memo No. M-205-77 (Sept. 26, 1977).

State policies were put into evidence at Pl. Exh. 258a-uu. State policies, regulations, and statutes following implementation of the Hyde Amendment have been lodged in a separate volume for the convenience of the court as Vol. I.

[11] *See* Georgia: GA. CODE ANN. § 99-4616; Texas Constitution, Article 3 § 51A; Delaware, House Bill No. 333, Appropriations FY ending June 1980, Sec. 19(a)(ii).

[12] Missouri, for example, limited abortion funding to situations where continuation of the pregnancy "would cause cessation of the mother's life." Mo. 13 C.S.R. 40-81.100 (1977). Rhode Island and Illinois also used a "preserve life" standard. Rhode Island, State of Rhode Island, Dept. of Soc. and Rehabilitative Services, Policy & Procedure to be Followed in Order to Determine Medical Necessity for Abortions (Oct. 1, 1977), P.A. 80-191; Ill. Rev. Stat. §§ 5-5, 6-1, 7-1 (Supp. 1977). In New Jersey a court injunction was lifted and a "preserve life" standard implemented. N.J.S.A. 30:406.1 *See Doe v. Klein*, *supra*.

[13] Alaska, California, Colorado, Hawaii, Idaho, Maryland, Massachusetts, Michigan, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and the District of Columbia.

[14] *Alabama*: State of Alabama, Medical Services Administration letter (Feb. 22, 1978);
Arkansas: State of Arkansas, Division of Soc. Services, Dep't of Human Services, Memorandum MSP-77-A/B-24 (Dec. 22, 1977);
Delaware: House Bill No. 888, Sec. 37(b)(iii). Appropriations for FY ending June, 1979 [state funds appropriated for medical assistance under Title XIX shall only be expended where federal matching funds are provided];
Georgia: GA. CODE ANN. § 99-4616 (1977) [state will not cover services for which it does not receive federal matching funds];

Indiana: State of Indiana, Dep't of Public Welfare, Ad. Bull. (Dec. 15, 1977);

Maine: Maine Medical Assistance Manual, Chapter III, Sec. 15, (Aug. 21, 1978);

Mississippi: Blue Cross/Blue Shield of Mississippi, Fiscal Agent Medicaid Program, Medicaid Bull. No. Phys./Hosp. 78-2 (April 18, 1978);

Montana: State of Montana, Economic Assistance Division, Soc. and Rehabilitation Services (Jan. 5, 1978);

Nevada: Nevada State Welfare Division, State Assistance for the Medically Indigent (S.A.M.I.), Bull. No. 97 (July 19, 1978);

New Mexico: State of New Mexico, Dep't of Human Services, Human Services Register, Vol. 1, No. 7 (June 26, 1978);

Ohio: Ohio Dep't of Public Welfare Medical Assistance Letter [M.A.L.] No. 71 (Jan. 5, 1978);

Oklahoma: State of Oklahoma Welfare Commission, Dep't of Institutions and Rehabilitative Services (Dep't of Public Welfare, Form letter);

South Carolina: South Carolina Dep't of Soc. Services, Circular Letter No. 2320-A (Feb. 24, 1978);

Tennessee: State of Tennessee Bureau of Medicaid, Dep't of Public Health, Official Notice (June 6, 1978);

Texas: Texas Agency Rules § 326.3612.021 (Aug. 18, 1978);

Vermont: Vermont Welfare Assistance Manual § 2461.7 (Nov. 1, 1978);

Wisconsin: State of Wisconsin, Division of Health, Dep't of Health and Soc. Services, Medical Assistance Provider Bull. MAPB-78-004-A, 005-B (April 5, 1978).

Iowa reimbursed for terminating pregnancies which were life-endangering, the result of rape, incest, or where the fetus was "physically deformed, mentally deficient or afflicted with a congenital illness." State of Iowa, Dep't of Soc. Services, Soc. Services Circular Letter 143 Med (No. 75) (May 30, 1978). California and Maryland also provided for abortions in cases of fetal defect. The California policy also covered: first trimester abortions for victims of rape; first and second trimester abortions for victims of incest, where the incident had been reported; first trimester abortions where two physicians had certified that there was a threat of severe and long-lasting health damage due to a specifically cited condition; and abortions for females under sixteen if their parents had been informed. California State Statutes of 1978, Chap. 359. The Maryland policy also allowed for abortions when the mother's life or health was threatened, and in cases in which the pregnant woman was the victim of sexual assault which had been reported. COMAR 10.01.02.04K.

Others retained the 1977 standard.[15] Still others adopted or retained more restrictive standards,[16] and a few continued reimbursement with state funds.[17]

Although the Hyde standard was unchanged in 1979, some states moved to more restrictive policies.[18]

---

[15] Connecticut, Florida, Kansas, Nebraska, North Dakota, Utah, Wyoming. *See* n. 14, *supra*. Virginia went from funding all abortions to the 1977 Hyde standard. Virginia Dep't of Health, Memo: Abortions Covered by Medicaid (Dec. 12, 1977). Massachusetts, which had funded all abortions, restricted reimbursement to life-endangerment, rape, and incest. Mass. Stat. 1978, c. 367, § 2, Item 4402-5000.

[16] Rhode Island and New Jersey retained their 1977 "preservation of life standards; Missouri kept its "cessation of life" standard; and Kentucky and Louisiana enacted similarly strict laws. KY REV. STAT. § 205.510(3) (June 17, 1978); LA. REV. STAT. 40:1299.35. Pennsylvania and South Dakota, which had been funding all or medically necessary abortions, enacted statutes using "save the life" and "preservation of life" standards. Pa. Act No. 1978-148; S.D. COMP. LAWS ANN. § 28-6-4.5. Minnesota permitted reimbursement to "preserve life" and in cases of rape and incest.

Minnesota's policy allowed for reimbursement for abortions after rape, if the assault was reported within forty-eight hours after the victim became physically able to make the report, and after incest if the incident was reported prior to the time of the abortion. MINN. STAT. ANN. § 256B.02, Subd. 8 (1978).

[17] Alaska, Colorado, Hawaii, Idaho, Maryland, Michigan, New York, Oregon, Washington, D.C.

[18] Indiana adopted a "preserve life" standard less than a year after it adopted the 1978 Hyde standard. 1979 Ind. Acts No. 1414 P.L. 153, Sec. 1 [amending IC 16-10-3]. Idaho shifted from reimbursing for abortions "necessary to save the life or health" of the woman to the 1978 Hyde standard. Bureau of Medical Assistance, Idaho Dep't of H.E.W. § 3-1413. North Dakota changed from a life-endangering standard to a standard forbidding all public funds for performing or "promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman." N.D. Cent. Code § 14-02.3-01 (1979). However, Florida in 1979 adopted the 1978 Hyde Amendment standards.

In 1980, several states followed the congressional lead and eliminated the "severe and long-lasting physical health damage" provision.[19] Only one state has substantially liberalized its abortion funding policy after restricting it pursuant to the first Hyde Amendment.[20]

States had no guidance from HEW which, until recently, refused to take a position on the effect of the Hyde Amendments on the states' underlying obligations under the Social Security Act.[21] Repeated inquiries from state officials and courts went unanswered.[22] In his comments on the regulations, Secretary Califano carefully noted that:

[19] *Alabama*: State of Alabama, Medical Services Ad., Memo (Oct. 25, 1979);
Arkansas: State of Arkansas, Division of Human Services, Official Bulletin (Dec. 17, 1979);
Delaware: House Bill No. 333, Sec. 19(a)(iii), Appropriations, FY ending June, 1980;
Georgia: GA. CODE ANN. § 99-4616 (1977);
Mississippi: Blue Cross/Blue Shield, Fiscal Agent Medicaid Program, Medicaid Bull. Nos. Hosp./Phys. 80-1 & 2 (Jan. 30, 1980);
Nevada: Nevada State Welfare Division, Medicaid Manual § 703.4 (Oct. 24, 1979);
New Hampshire: Division of Welfare, Medical Assistance § 9624.3 (Item 926) (Feb. 1979, SR-79-18);
Oklahoma: Oklahoma Public Welfare Commission, Dep't of Institutions, Soc. and Rehabilitative Services (Dep't of Public Welfare Form Letter);
Texas: Texas Agency Rules § 326.3612.021 (1980);
Vermont: State of Vermont, Agency of Human Services, Dep't of Soc. Welfare, Memo (Dec. 7, 1979).

[20] North Carolina Ad. Code, Human Resources—Individual and Family Support, Subchapter 42W.0001.

[21] It is the current position of HEW that Title XIX of the Social Security Act requires states to reimburse for all medically necessary abortions, as long as federal reimbursement is available. *See* U.S. Brief, *Williams* v. *Zbaraz*, No. 79-4, n. 23 at 43.

[22] In April, 1978, HEW advised a Maryland state legislator that it had not yet determined whether the states were obligated to fund all medically necessary abortions (Pl. Exh. 274 A & B). Responding to another inquiry from Nebraska, the Department stated that it had no position concerning a state's right to implement a policy more restrictive than the Hyde standards. (Pl. Exh. 275 A & B).

> These regulations only govern the instances where federal funding is available for abortions and other medical procedures. They do not deal with the separate question of circumstances under which a state must fund abortions under the Medicaid program. 43 Fed. Reg. 31868, 31875 (1978).

No administrative actions were ever taken by HEW against those states which restricted coverage beyond the then current Hyde Amendment.

Litigation has, to a considerable extent, changed the pattern of state funding. Of the 23 states which were reimbursing for all, or all medically necessary, abortions before the nationwide injunction issued by the district court went into effect, 14 were doing so under a court injunction.[23] On March 10, 1980, the Tenth Circuit struck down the restrictive Utah statute and ordered funding of all medically necessary abortions. *D. R. v. Mitchell*, No. 78-1675 (10th Cir., March 10, 1980).

[23] Calif.: *Committee to Defend Reproductive Rights v. Cory*, S.F. No. 24053 (Cal. Sup. Ct., Sept. 20, 1979) (staying operation of restrictive statute); Conn.: *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (D. Conn., Jan. 7, 1980); Ga.: *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga., 1979); Ill.: *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), *appeal granted juris. postponed*, *Williams v. Zbaraz*, *Miller v. Zbaraz*, *U.S. v. Zbaraz* (Nos. 79-4, 5, 491), 48 U.S.L.W. 3356 (Nov. 26, 1979); La.: *Emma G. v. Edwards*, No. 77-1342 (E.D. La., Nov. 27, 1978); Mass.: *Preterm Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied* No. 78-430, 99 S. Ct., 2182 (1979)); Minn.: *Hodgson v. Board of County Commisioners*, 3 Medicare & Medicaid Guide (CCH)

3. The Impact of the Hyde Amendment Has Been to Limit Medicaid Abortions, in a Random Manner, to Only 1% of Those Poor Women Who Obtained Them Prior to Its Implementation.

The Hyde Amendment has had a devastating effect on a significant number of poor women for whom an abortion is medically necessary because their pregnancies threaten their lives and health. *See* Section C.5, *infra*. The trial court found that where restrictive standards have been implemented, the vast majority of medically necessary abortions have been excluded from Medicaid coverage and abortion has been relegated "... to a procedure limited to crisis intervention in cases with fully developed symptoms. . . ." [24] Slip op. at 158-59.

The data from states which have implemented a Medicaid standard more restrictive than "medically necessary" shows that since fiscal year 1976—the last year Medicaid monies were provided for all or most

¶ 30,159 (8th Cir. Jan. 9, 1980)(No. 79-1665); Mo.: *Reproductive Health Services v. Freeman*, 3 Medicare & Medicaid Guide (CCH) ¶ 30,160 (8th Cir., Jan. 9, 1980)(No. 79-1275); Neb.: *Orr v. Nebraska Dept. of Public Welfare*, Civ. No. 80-031 (D.Neb. Jan 25, 1980); N.J.: *Right to Choose v. Byrne*, 398 A. 2d 587 (N.J. Super. Ct. Ch. Div. 1979); Ohio: *Planned Parenthood Affiliates v. Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979); Pa.: *Roe v. Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); W. Va.: *Smith v. Ginsburg*, No. 75-0380 CH (S.D.W. Va. May 9, 1978); Wis.: *Doe v. Percy*, 476 F. Supp. 324 (W.D. Wisc. 1978).

[24] Brief of the United States in *Williams v. Zbaraz*, n. 30 at 59, states that ". . . it is unwarranted to assume . . . that a pregnant woman must actually be near death before she can receive Medicaid funds for an abortion." The statistics presented in this case prove, and the district court so found, that such an assumption is absolutely correct. Slip op. at 58-61. *See* Pl. Exh. 24, p. 209; Pl. Exh. 177/T.4879, A.289, A.141-45.

abortions—the number of funded abortions has decreased 98-99%. (Pl. Exh. 177/T.4879, A.289.) For all states, the approximate number of federally funded abortions went down from 260,800 in 1976 to about 2,767 in 1978, a decrease of 99%.[25] (Pl. Exh. 24, p. 209/T.1534., A.262; A.143.) For the last quarter of 1978, 28 states, Puerto Rico, and the District of Columbia reported *no* abortions qualifying for federal reimbursement under the 1978 Hyde standard. (p. 5, A. 142.) The evidence shows that the precise wording of the restrictive standard is virtually irrelevant. The statistics confirm the medical testimony that under the Hyde standard, or any standard more restrictive than "medically necessary", [26] the number of Medicaid abortions will be drastically reduced. (Jaffe, T. 4873.) Even women who would qualify under the restrictive standards will not actually be covered because the standards are unclear to physicians. Slip op. at 322-23.

Statistics from 22 states which reported Medicaid abortions for the last quarter of 1978 show that seven states, reporting 130 of the 780 Medicaid abortions, reported none under rape or incest and none under severe and long-lasting physical health damage.[27]

[25] HEW statistics report 2421 abortions from Feb. 14, 1978 to Dec. 31, 1978. The annual number would then be about 2,767. (A.143)

[26] A broad construction of the term life-endangerment to include health considerations by the State of Virginia (*see Doe v. Kenley*, 584 F.2d 1362 (4th Cir. 1978) has made no difference whatsoever. For 1978 Virginia reported only nine Medicaid abortions (A.144). a decrease of 99.8% from 1976 when Virginia covered 5,200 Medicaid abortions. (Pl. Exh. 24, p. 209/T.1534, A.262.)

[27] The fear was expressed in Congress that the elimination of "forced" before "rape" would lead to widespread use by teenagers who would qualify under statutory rape. Annex to slip. op. at 212,

(A.141.) Illinois, reporting 59 abortions over three months, assigned 15 to life endangerment, 41 to severe and long-lasting health damage, and three to rape and incest. Illinois accounted for 47% of the cases assigned to severe and long-lasting health damage in the last quarter of 1978. Slip op. at 60.

These statistics support the trial court's finding that the Hyde standard, indeed any standard other than "medically necessary," is so unworkable that it limits Medicaid abortions to crisis situations, and does not even provide funded abortions for the few women intended to be covered. Slip op. at 99-100, 159, 322-23.

4. Plaintiff Class Members, for Whom Abortion Is Medically Necessary, Have Suffered Increased Health Risks Because of the Hyde Amendment.

Plaintiff class members include Medicaid-eligible women for whom abortions are medically necessary, but who do not qualify under the Hyde Amendments. (A.59-61.)

In 1976, HEW estimated it financed between 250,000-300,000 abortions. Slip op. at 14. The number of poor women who wanted abortions but could not get them was undoubtedly higher.[28]

---

281. 123 Cong. Rec. H 10834 (daily ed. Oct. 12, 1977), 123 Cong. Rec. H 12489 (daily ed. Nov. 29, 1977). The statistics show this fear was unfounded. In the fourth quarter of 1978, there were only 25 rape and incest abortions reported in the entire country, 14 were from Oregon. (A.141.)

[28] One HEW official estimated that in 1973, there were probably over 1 1/2 million unwanted pregnancies of Medicaid women annually; this represents almost half of all welfare recipients of childbearing age. (Pl. Exh. 214, p.9) Slip op. at 15.

The number of these pregnancies which present a health risk to the woman is unknown, but substantial.[29] (See Section C-5, *infra*.) The limited data at the time of trial showed that the impact of the Hyde Amendments has been to cause increased risks to life and health.

An article published by doctors working at the United States Center for Disease Control (CDC) estimated that if publicly-funded abortions were restricted in all states, from 5 to 90 excess deaths would result for poor women of childbearing age in the United States each year. (Pl. Exh. 240, p. 6, A.296.) The analysis was based on increased mortality risks which accompany each of the three alternatives available to poor women: delay in getting money to pay for a legal abortion; choosing a non-legal abortion; or choosing to carry a pregnancy to term. This article does not deal with the increased risk of serious complications due to illegal abortion (estimated to be about 100 times the number of deaths from illegal abortions)(Tietze, A.200), nor the effects on health of carrying a complicated pregnancy to term.

The full impact of the funding restrictions on the plaintiff class is unknown for several reasons. First, funding restrictions have affected only about 20% of the plaintiff class, since the most populated states have thus far continued funding.[30] Second, there is no com-

---

[29] The plaintiffs-appellees' in *Williams v. Zbaraz* point out that under a medically necessary standard in 1978, Illinois funded about 10,666 abortions, less than 50% of the number it had funded in 1977, (21,663), when both elective and medically necessary abortions were reimbursed (Brief of Appellees, at 7).

[30] The number of women at risk has varied greatly because court orders and states on their own, have changed policies. (See Section

plete reporting system for complications arising from illegal abortions, as there is for Medicaid deaths.[31] Further, since reporting and investigation on abortion deaths can take up to 24 months (Pl. Exh. 260, p. 6), and the increased mortality of women forced to carry complicated pregnancies to term takes months to ascertain, that data has not yet been compiled.[32] The CDC noted that, in 1977, "for the first year since 1972, there was an increase in the annual number of illegal abortion deaths." Slip op. at 70. (Pl. Exh. 260, p. 15.)

C-3, *supra*.) Although, 23 states and the District of Columbia were funding, as of February 19, 1980, because so many of the injunctions are recent, the figure of 20% is more accurate when gauging impact.

[31] The trial court found, upon examination of all available data, that the extent of hospitalizations resulting from botched illegal abortions was "indeterminate." Slip op. at 74. Defendants provided information on a 24-year-old black woman who, in her 12th week of pregnancy, unsuccessfully sought an abortion in South Carolina. She could not obtain one because she could not afford the fee, and was aborted illegally in February 1978, apparently in her 16th week, when mortality risk is much higher. She was later hospitalized for post-abortion complications that necessitated a hysterectomy, rendering her sterile. Slip op. at n.27. (R.122, pp.4-6.)

[32] There is some evidence of increased childbirth, *see* Brief of Appellees in *Williams v. Zbaraz*, at 18-19, footnote. In *Women's Health Services Inc. v. Maher*, Civ. No. H-79-405, (slip op. at 13) (D. Conn. Jan. 7, 1980), the trial court made a finding of fact that, in one sample, 37% of those women seeking medically necessary abortions in Connecticut were "forced to carry their abnormal pregnancies to term." On the other hand, the trial court in this case found that "in Romania, where abortion was sharply restricted commencing in November 1966, the effect was a drastic increase in hospital admissions for complications arising from illegal abortion and a sharp increase in abortion-related maternal deaths; a short-term increase in birth rate was followed by a decline in birth rate, ascribed by Tietze and Murstein to resort to 'folk methods of contraception and illegal abortion.'" Slip op. at 67-68. (Pl. Exh. 13, p. 65/T.1040.)

CDC concludes that the implementation of the Hyde Amendment may have been responsible for several deaths, and was certainly responsible for the death in 1977 of a Mexican-American woman who had had two previous Medicaid abortions.[33] She resorted to obtaining a low-cost abortion from a lay midwife on September 16, 1977, about a month after Texas implemented the Hyde Amendment. Despite intensive care, she died in imminent septic shock. Slip op. at 71.[34]

The trial court found that the risk of serious complications increases 20% and the risk of death increases 50% for each week abortion is delayed (slip op. at 65), and that Medicaid-eligible women who eventually obtained abortions in non-funding states did so only after delay, thereby increasing risks:

> The evidence requires the conclusion that the consequence of the legislation has been at the very minimum to delay abortions with the serious consequence of increasing maternal mortality risks,

---

[33] The draft summary of the 1977 report states:

> Public policy decisions may have created an environment of uncertainty for low-income women about the availability of legal abortion services, whether they lived in states which were continuing public funding for abortion or those which were not. However, because of the small numbers involved, chance fluctuation of a rare event is a possible explanation for this increase in illegal abortion-related deaths. Moreover, for at least one woman, the non-availability of public funds led to a situation in which was forced to choose the less safe, illegal abortion because of financial factors. (Pl. Exh. 260, p.14.) Slip op. at 72.

[34] Plaintiffs ask this Court to take judicial notice of the fact that, subsequent to the trial in this case, CDC found four illegal abortion deaths relating to the Hyde Amendment. *See* Associated Press article, Boston Globe, February 12, 1980, p. 3. A copy of this article is attached to plaintiffs' papers in opposition to defendants' motion for a stay, February 12, 1980.

that the restrictions on funding have in fact caused some resort to illegal abortion, although the extent of that is not measurable, and that in fact Medicaid-eligible women who wish to terminate their pregnancies have no significant alternative to Medicaid for obtaining abortion.[35] Slip op. at 158.

5. The Hyde Amendment Standard Does Not Cover the Vast Majority of Medical Problems which May Make Abortion Medically Necessary.

The trial court found, in exacting detail, that the Hyde Amendment standards, whether life-endangering or, as in 1978 and 1979, life endangering plus severe and long-lasting physical damage, "do not include but exclude the greater part of the cases in which the profession would recommend abortion as medically necessary procedure to safeguard the pregnant women's health." Slip op. at 308. The denial of medically necessary abortions does not and cannot further any interest in "normal" childbirth and exacts a toll on poor women in terms of the effect on their lives and health. Slip op. at 311, 158.

It is undisputed that pregnancy represents a greater than normal risk of morbidity and mortality for some women than for others. Slip op. at 88-9. Whether the

[35] Delay caused by trying to raise the money involves more than increased risks to the woman's life or health. One court recently found that, of 144 poor women seeking abortions, the 63% who were able to raise the money did so by "not paying rent or utility bills, pawning household goods, diverting food and clothing money or journeying to another state to obtain lower rates or fraudulently using a relative's insurance policy . . . some patients were driven to theft." *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (slip op. at 14) (D. Conn. Jan. 7, 1980).

risks are such that, considering all factors,[36] an abortion is medically necessary, is ". . . inescapably a medical question that must be resolved in terms of many variables of time, of patient's will, of patient's medical history, of patient's family situation, and of the patient's mental health and her age." Slip op. at 160.

a. Physical Factors Cause High Risk Pregnancies.

There are numerous pre-existing conditions and complications which occur because of pregnancy which may be important factors in determining an abortion to be medically necessary, but which cannot be certified under Hyde standards.[37] The result is that women's health is sacrificed, and doctors are forced to forego exercising their best medical judgment.

Plaintiff Jane Doe is a 25-year-old woman with four children. Following the birth of her third child, she developed a serious case of phlebitis, which had required lengthy hospitalization. (Doe Aff., § 3, A.109; Hodgson Aff., § 3, A.111,195.) Continuing her pregnancy would greatly aggravate that condition and increase the risk of blood clots to the lung. (Hodgson,

[36] For a complete list of 84 factors compiled by eminent obstetricians to be considered in whether pregnancy or childbirth will have a higher than normal risk, plaintiffs submitted into evidence criteria used by the Maternity Center Association, an out-of-hospital birthing center in New York. (Romney, T./ 1138.) A cumulative score of two points made women unacceptable for the program and women were reevaluated throughout their pregnancies. (Pl. Exh. 18/T. 1138) The trial court found the list to "traverse the range of factors that can at varying intensity levels become indications for termination of pregnancy." Slip op. at 94-5.

[37] *See* Brief *Amici Curiae* of Planned Parenthood Federation of America, *et al.* filed jointly in *McRae v. Harris* and *Williams v. Zbaraz*, at 14-29.

A.195.) Moreover, drugs to treat the clotting are dangerous to the fetus. (A.195.) Although her doctor felt an abortion was medically necessary, she could not certify that Jane Doe's life would be endangered if the pregnancy were carried to term (A.195.) Slip op. at 96-7.

Plaintiff Doctor Bingham described a 16-year-old mother of two with rheumatic heart disease. Although he felt her pregnancy would aggravate the condition, it would not threaten her life. Slip op. at 111. Another member of the plaintiff class, from Minnesota, patient "X", was 18 when her doctor applied for a Medicaid abortion for her in December, 1977, under Minnesota's 1977 Hyde standard.[38] (A.114.) Patient X is and was a victim of juvenile rheumatoid arthritis, and had been so incapacitated she had been tutored at home her last two years of high school. In 1977, she had had a child by caesarean section and had been incapacitated during most of the pregnancy. Patient X was on several drugs for her arthritis, at least one of which is contraindicated during pregnancy. (Hodgson Aff., 1/4/78, A.119) Despite letters from two doctors and an evaluation from the Mayo Clinic, her abortion request was denied. (A.116.)

Another plaintiff, Susan Roe, was 19 when she became pregnant, only four weeks after having had her first child. Although her doctor felt that an abortion was medically necessary for both mental and physical reasons, since the short interval between pregnancies increases risk of premature labor or low lying placenta, the doctor could not certify her under either the life

[38] No pseudonym was used by this class member, whose case and supportive documents are in Appendix at 113-21.

endangering or the severe and long-lasting physical health damage standard. (Hodgson, A.122, 127.)

Diabetes is another condition which, if uncomplicated, is possible to treat, but which requires a complete evaluation of the total environment of the woman. A report by the British Medical Association on indications for termination of pregnancy concludes: "In a woman with severe diabetes who already has two or more children, increase in family responsibilities through further pregnancies will complicate seriously the proper control of her diabetes." (Pl. Exh. 3, p. 173-4/T. 55.) Although a diabetic woman is not likely to die from pregnancy, on the average, each pregnancy potentially shortens the life of a severe diabetic by five years. (Hodgson, T. 66.) Dr. Eliot testified about a Medicaid patient, a 14-year-old deaf woman with juvenile diabetes. (A.165.) Because of the increased risks due to her diabetes and age, Dr. Eliot regarded the abortion as medically necessary but not certifiable under the Hyde life endangerment standard. (A.165-66.)[39]

Cancer is another condition where an abortion may be medically necessary, but there is debate as to whether pregnancy would actually endanger the woman's life. Slip op. at 105-06. It is clear, however, that chemotherapy and radiation therapy have to be stopped since they damage the fetus.[40] Slip op. at 106. (Rothchild, T-804; Pl. Exh. 3, p. 174/T. 55.)

[39] One possible complication from diabetes aggravated by pregnancy is blindness, which had happened to one of the witnesses' patients. (Hodgson, T. 87.)

[40] Brief of *Amicus Curiae* Planned Parenthood Federation of America, *et al.*, *Williams v. Zbaraz* at 16.

Another common problem is presented by women who become pregnant with an intrauterine device ("IUD") in place.[41] If pregnancy continues, the risk of death from a spontaneous uterine infection, while still statistically small, increases 50-fold. (Pl. Exh. 213, p. 41.) Slip op. at 104. If it occurs, generally late in pregnancy, it is overwhelming and usually untreatable; a patient may die within 48 hours. (Hodgson, A.197.) Seventeen women died from this between 1972 and 1974. (Pl. Exh. 16, p. 5/T.970-71.) The Food and Drug Administration has issued regulations directing that abortion be offered as an option when pregnancy occurs with an IUD in situ and removal is difficult. 21 C.F.R. §§ 310.502, 801.427. (Hodgson, A.196.) HEW has made this same recommendation. (Pl. Exh. 213, p. 42.) All witnesses agreed that in such instances abortion is medically necessary, and in fact approximately two-thirds of the pregnancies occurring with an IUD in the uterus have been terminated by first trimester abortions. (Pl. Exh. 16, p. 5/T. 970-71.) However, because it is impossible to predict what would happen to any particular woman later in her pregnancy, doctors cannot certify women with IUD's in place under the life endangerment standard.[42] Slip op. at 104, 110. (Eliot, A.164.) Doctors are therefore placed in the professional dilemma of being required by federal regulation to tell their Medicaid patients that, although

[41] Pregnancy occurring with use of an IUD is not uncommon. One study found 8-12% of women became pregnant during the first year of IUD use. (Pl. Exh. 27, p. 140/T.1567.)

[42] Dr. Eliot testified, "I would have to classify such a case [pregnancy when the IUD cannot be removed] on a statistical basis as preserving her health rather than an imminent threat of danger to her life if she continued the pregnancy." (A.164.)

abortion is the recommended treatment, it will not be a covered medical procedure.

Malnutrition (slip op. at 102, Pl. Exh. 3/T.55); anemia (slip op. at 102, 108); heart disease (Pl. Exh. 3, p. 171/T.55); sickle cell anemia (slip op. at 108); cancer (slip op. at 105-06, Pl. Exh. 3, p. 174/T.55); urinary infections (slip op. at 107); phlebitis (slip op. at 104-05); and benign tumors (slip op. at 106-07) are all tions which, depending on a woman's total circumstances, including her motivation and cooperativeness, may make an abortion medically necessary.[43] Another important example is hypertension. Although three out of four hypertensive women can have successful pregnancies (Pl. Exh. 3, p. 172/T.55), the disease itself, even after treatment, entails a seven times higher risk of developing pre-eclampsic toxemia—one of the leading causes of maternal mortality. (Pl. Exh. 3, p. 172/T.55; Sloan, A.173; Romney, T.3968.) The trial court found that physicians cannot certify any of these complications of pregnancy for abortion under the life endangerment or severe and long-lasting physical health damage standards in the 1978 and 1979 Hyde Amendments,

> . . . because of the special nature of the life and health risks that all pose in some degree of their occurrence, and at some stage of gestation. The supporting data for safe certification cannot be at hand at the time when professional judgment would approve a termination of the pregnancy as "medically necessary," as that term is understood in the medical profession. Slip op. at 110.

[43] The trial court gave examples of physical conditions that can become life threatening, but which cannot be predicted early in the pregnancy:

(footnote continued on next page)

b. Emotional and Psychological Factors Cause High Risk Pregnancies.

Plaintiffs presented uncontested evidence about the devastating psychological and emotional effects unwanted pregnancies have on many women, and which may make abortion medically necessary.

The trial court found that the evidence demonstrated

> the impact of unwanted pregnancy on mental health, both in gravely aggravating mental ill health that existed before the pregnancy, and in producing severe mental disturbance, including suicidal ideation, in the case of patients in trying life circumstances who are already near the limits of endurance. Slip op. at 116.

But the Hyde Amendments do not authorize abortion to avoid even certain and serious and long-lasting psychological damage.[44]

Pregnancy can aggravate myoma: if the tumor grows beyond the vascular supply needed to keep it benign, the tumor may become necrotic and produce peritonitis, abscess formation, infection and so become life-threatening. Urinary tract infections, too, are not uncommon, but, Dr. Romney testified, the possibility of an ascending urinary tract infection is increased during pregnancy; if it remains a mild cystitis, that is, a localized bladder infection, it may not be dangerous; but if a virulent infective organism produces a severe cystitis, that can develop into a renal abscess, and, in a patient with a large pregnant uterus, prevent proper drainage, seriously threaten control of the infection and so jeopardize the woman's life. Slip op. at 107.

[44] Congressional debate surrounding the adoption of the 1978 and 1979 Hyde Amendments, which allowed for "severe and long-lasting physical health damage," makes clear that all mental health concerns were to be excluded. Slip op. at 123; Annex to slip op. at 236, 244, 247.

Plaintiff Ann Moe was 15 when she applied for a Medicaid abortion in January, 1978. She had spent most of the preceding three years in adolescent psychiatric wards and correctional institutions, and was diagnosed schizophrenic. Dr. Hodgson believed an abortion was medically necessary because not only was the patient at higher physical risk due to her youth, but also continued pregnancy would result in serious mental health damage. Yet she could not certify Moe under the Hyde Amendment. (Hodgson Aff., A.113.)

Although an unwanted pregnancy is stressful for anyone, for the psychiatrically disturbed the danger of breakdown is greater, and patients who are under treatment can become psychotic and regressed, particularly if medication is discontinued because it may cause a developmental defect in the fetus.[45] Slip op. at 119. (Belsky, T.3520-21.)

One Medicaid patient whose pregnancy threatened her recovery was a 33-year-old mother of three children who was hospitalized in a state mental hospital. (Eliot, A.162.) She got pregnant on a weekend furlough, despite using a diaphragm. Although she obtained a Medicaid abortion and her mental health continued to improve, her doctor testified that he would not have been able to certify her under the life endangerment standard.[46] (Eliot, A.163.) Another woman,

---

[45] One study of 21 women hospitalized in a psychiatric ward found that the vast majority reporting an unwanted pregnancy felt continuing it and caring for children had contributed to their decompensation. Grunebaum, et. al., The Family Planning *Attitudes, Practices and Motivations of Mental Patients*, 128 Amer. J. Psychiatry, 470 (1971). (Pl. Exh. 160/T.3633.)

[46] Another example of a woman whose pregnancy represented a set back in her mental health was 19 when she applied for an abortion. From the age of 12 to 16 she had had an incestuous

described by her psychiatrist as "paranoid schizophrenic" (Pl. Exh. 159/T.3601, A.280.) became psychotic because of her unwanted pregnancy, and exhibited physical symptoms such as constant vomiting, causing a weight loss of 18 pounds. Another woman who was retarded, had four small children she could not cope with and thought of burning herself and them up. The thought of another child led her to attempt jumping from the roof. (Pl. Exh. 156/T.3590, A.278.) She obtained an abortion because her doctor described her as suicidal and homicidal, but it is not clear that she could be certified under the Hyde standard.

The trial court made findings, overwhelmingly supported by the evidence, that for some women the unwanted pregnancy itself can produce severe psychiatric problems.[47] Slip op. at 120-22. Medicaid-eligible women are more exposed to stress, and thus more susceptible to mental illness caused by stress, than are others.[48]

---

relationship with her father. At 16 she became pregnant, delivered a baby at home alone, and threw it in the garbage. She began using heroin to alleviate her guilt and depression. With psychiatric treatment in a residential center, she was able to improve to the point that she started college. As a result of her new unwanted pregnancy, her mental health started to deteriorate, with serious feelings of guilt and self-hatred. (Pl. Exh. 151/T.3594, A.273.)

[47] The President's Commission on Mental Health, Subpanel on Mental Health of Women underscored the issue of reproductive freedom "because of particular importance to the prevention of mental disorders among women" (p. 1078) and recommended Medicaid funding for abortion be resumed (p. 1099). (Pl. Exh. 257.) Slip op. at 121.

[48] Dr. Belsky described one woman who developed an anxiety neurosis because of all the rats in her dilapidated apartment. Despite her efforts at cleaning, there were rats and rat feces all over. Her five-year-old son could not sleep by himself because he was so frightened. (T.3623, A.186.)

(Belsky, A.185.) For one woman with three children whose husband had been murdered the month before she discovered she was pregnant, the pregnancy was the breaking point.[49] (Pl. Exh. 159-c/T.3601, A.283.)

It is very difficult for doctors to assess threats of suicide (Eliot, T. 484), and applications on that ground under the pre-1973 criminal abortion statutes were largely approved only for private patients. (Pl. Exh. 142/T.3529; Pl. Exh. 143/T.3529; Belsky, T.3533; Tietze, T.989-90.) Slip op. at 85-6. Yet it is equally clear that the stress of an unwanted pregnancy makes poor women all the more desperate. (Belsky, A.187.) Threats to their lives, either by suicide or by dangerous self-abortions, have been and continue to be common.[50]

Although doctors would probably be able to reach a consensus on an evaluation of the effect of an unwanted pregnancy on a particular woman's mental health, a certification that her life would be en-

---

[49] Plaintiff Mary Doe, at the time of her abortion application, was a 19-year-old Connecticut woman who had four small children. Her doctor testified that she was so desperate about her pregnancy that if she could not get a legal abortion, she would try to abort herself and risk permanent damage. Even if he would do the abortion she was in the second trimester and could not be admitted to the hospital without prior medical approval. (A.182-83.) Dr. Bingham did not think he could certify her under the Hyde standard. (A.107-08, 183.) However, he could certify her under a standard of medical necessity. (A.183.)

[50] One unpublished study by Dr. Belsky consisted of interviews and follow up of 90% of the poor women who got abortions at Bellevue Hospital in 1969-70. (Pl. Exh. 144/T..3538, A.267.) Before the Therapeutic Abortion Committee was abolished, out of 204 patients, 77, or 37.7% attempted either an illegal or self-induced abortion. (Pl. Exh. 147/T.3554, A.269.), and 23 out of 204 or 11% tried to commit suicide (Pl. Exh. 148/T.3554, A.270.) Before abortion was legalized, nationally about 18% of all maternal deaths were due to abortion. In 1965 there were 235 deaths. Slip op. at 10.

dangered would arbitrarily depend on a doctor's view of whether to cerify what is statistically a remote possibility, at least for a general population. (Eliot, A.161-63; Hodgson, A.68-68a, 112, 146; Romney, T.1124-25, 3970-71; Pisani, T.2216; Tietze, T.899; Belsky, T.3532.) *See* Slip op. at 123.

Medical studies document that being forced to continue an unwanted pregnancy can be a major factor contributing to mental illness in women.[51] A woman's psychological and emotional response to an unwanted pregnancy causes physical risks, just as mental or emotional factors can cause such symptoms as asthma or ulcers. (Sloan, A.170.) Aside from suicide and self-abortion attempts, both unquestionably risky to health and life, other psychosomatic illnesses occur, such as hyperemesis, excess vomiting so severe as to require hospitalization.[52] (Sloan, A.168; Pl. Exh. 159/T.3601, A.280.) *See also* slip op. at 109-10.

---

[51] A British study comparing women who requested an abortion and were turned down with those who were permitted to terminate their pregnancies concluded: ". . . the stress of bearing an unwanted child can lead to psychiatric symptoms. In our series such symptoms were not uncommon, were sometimes protracted and were occasionally severe enough to require admission of the patient." The study also found that "patients in whom pregnancy was terminated on our recommendation had remarkable little psychiatric disturbance." Pare, *et. al., Follow-Up of Patients Referred for Termination of Pregnancy,* The Lancet, March 28, 1970, (Pl. Exh. 162, pp. 637-38/T.3633.) *See also,* Romney, T. 1121-23, 3940, 3945; Belsky, T.3618, 3689-91. Slip op. at 143-44.

[52] Dr. Sloan, Director of Psychosomatics in the Department of Obstetrics and Gynecology at New York Medical College, defined a psychosomatic condition as an "organic symptom that has manifested itself in its causation or etiology in the psyche or mental aberration." (Sloan, A.170.)

Hypertensive states of pregnancy, a leading cause of maternal mortality (Sloan, A.172.), is known to be exacerbated or caused by stress.[53] Another not uncommon symptom is excessive starch intake which in turn causes severe anemia. (Sloan, A.169.) Childbirth itself can become much more dangerous when the pregnancy is unwanted.[54] In describing the impact of unwantedness, the trial court, relying on Dr. Romney, stated:

> [T]he prognoses for wanted and unwanted pregnancies are different, and that the woman's failure in attitude, cooperation and motivation can result in the evolution of potential complications into reality; . . . labor of women whose pregnancies were unwanted was almost physiologically different from normal labor, and that the apprehensive, tense unwanting woman adjusted poorly to the delivery room, her tensions stimulating, experimental data suggest, the production of epinephrine (a hormone secretion of the adrenal gland) which inhibits the uterine contraction. Slip op. at 112. (T.1084.)

---

[53] Testimony related a statistical analysis showing a much higher incidence of preeclampsia (hypertension) among women who were seen in the psychosomatic clinic at Flower Fifth Avenue Hospital in comparison with other obstetrical patients. (Sloan, A.173.)

[54] Several witnesses testified that they had delivered babies for women at various Florence Crittenton Homes for Unwed Mothers, where there was a higher incidence of abnormal labor and caesarean sections. (Romney, T.1060-61; Sloan, A.174-75.)

c. Most Pregnancies Caused by Rape and Incest Are not Covered by the Hyde Amendment.

The 1977 Hyde Amendment specifically excluded federal funds for pregnancies resulting from rape or incest. Subsequent versions, as interpreted in HEW regulations, allow reimbursement only if the crime is reported within sixty days. 42 C.F.R. 441.205(a)(3) (1978).

Uncontested evidence proved that incest is alarmingly common, that incestuous relations usually continue over a period of time, and that the child victims are unlikely to report the crime promptly. Slip op. at 155-57. Pregnancy occurs in 20-25% of the reported cases of incest. (Sarles, T.3752.)

The trial court found that most pregnant rape victims are effectively denied Medicaid abortions because:

> The very young, those in fear of retaliation, those inhibited by a natural revulsion from recounting what happened, and those who fear unsympathetic and uncomprehending treatment by the authorities tend not to report rape to law enforcement agencies or to public health services. Slip op. at 151.
>
> Similarly with regard to incest, the trial court found:
>
> In the case of incest, the 60-day report requirement is inherently likely to restrict the availability of funding to a minor fraction of the total number of cases. Slip op. at 156-57.

The devastating effects of unwanted pregnancy resulting from rape or incest were undisputed. *See* slip op. at 151-57.[55] The data on certifications under the Hyde Amendment make plain that only a very small proportion of poor women, pregnant as a result of rape[56] or incest, have met the requisite reporting requirements for a federally funded abortion. Slip op. at 59, 151.

d. Familial Considerations, Including the Effect of Diagnosed Fetal Deformities, May Make Abortion Medically Necessary.

Familial considerations are part of a doctor's total evaluation of the effect of a woman's pregnancy on her health. They are also a consideration in whether a woman can follow an alternative form of treatment, such as bedrest. Dr. Eliot described a Medicaid patient who was pregnant because of contraceptive failure. She was 30 years old and had two mentally retarded children. She wanted an abortion because she feared

---

[55] The mental strain on incest victims is aggravated by the fact that their offspring have a high likelihood of deformity and/or death, even if the parents are normal. The only available study (Sarles, T.3765) shows that out of 18 children of incest, 11 died or suffered some deformity, including spastic cerebral palsy, cleft palate, and mental retardation. *See* Pl. Exh. 167, Adams, *et. al.*, *Children of Incest*, Pediatrics, Vol. 40, No. 1, July 1967, p. 59.

In the case of unwanted pregnancy resulting from rape, abortion is the preferred medical treatment to prevent possible suicide or drug use by the victim in an effort to rid herself of an unreasonable sense of guilt and self-punishment mixed with the desire to be rid of the product of the assault. Slip op. at 153-54. (Bard, T.1274.)

[56] Victims of statutory rape, such as plaintiff Ann Moe, are unlikely to report the act. (Ann Moe Aff. ¶ 1, 5, A.125-26; Hodgson Aff., 1/4/78, ¶ 3, 4, 10, A.113-14.) Testimony showed that teenagers, because of menstrual irregularities and ignorance, are unlikely even to know they are pregnant within 60 days of intercourse. (Romney, T.3974.)

her next child would also be retarded, and because she did not believe she could cope with the burden of an additional child, even if it were normal. Dr. Eliot testified that although he believed abortion was medically necessary for this woman and necessary for "her family's mental and physical health . . . [i]n no way was her life endangered by her pregnancy." (A.163.) Slip op. at 118.

Family circumstances can be so overwhelming[57] that not only the woman's health, but the health of her children is at stake.[58] (Pl. Exh. 159/T.3601, A.280.) Witnesses testified to patterns of child abuse exacerbated by an additional pregnancy.[59] (Belsky, T.3582-83, 3591-92.)

---

[57] One witness described a patient who had eight living children ranging from 2 to 19 years old. A ninth child died in an accident. The 19-year-old, who was severely retarded and epileptic, was unable to walk or speak. The 17-year-old had been emotionally disturbed since age four and beat his mother and siblings. The 6-year-old had a heart murmur; the 5-year-old had a congenital cardiac condition which required surgery; the 4-year-old was asthmatic; and the 2-year-old has bronchitis. Mrs. "X" had been on tranquilizers and was overwhelmed by the burdens of her unwanted pregnancy. (Belsky, T.3572; Pl. Exh. 1501/T. 3576-77, A.171-72.)

[58] Several witnesses spoke of situations of child abuse where their patients had unwanted children, repeating a cycle of such abuse when the patient had been abused as a child. (Belsky, T.3581-83, 3590-93; Slip op. at 219-30) Plaintiff Susan Roe, 19 years old, single and pregnant again when her child was 4 weeks old, swore in her affidavit that "I am fearful of becoming an abusive parent, like some of my friends, if a second pregnancy is forced upon me." (Susan Roe Aff. ¶ 2,3,6, A.123.)

[59] One poor woman seeking an abortion was thus described by her psychiatrist: "She was becoming very irritated every time the baby cried and she had done 'bad things' to her baby. The baby was nine months old. The bad things she did was to tie a rag around the baby's mouth when she cried to muffle the noise,

The trial court found that unwanted children born to women denied abortion suffer predictable disadvantages. Slip op. at 126. This conclusion was supported by the uncontested testimony of the medical witnesses and several controlled studies. Slip op. at 126-30. (Pl. Exhs. 161/T.3633, 163/T.3633; Belsky, A.187-90.)[60] HEW has recognized the correlation between abuse and the stress of poverty and unwanted childbearing. (Pl. Exh. 282, p. 25.)

Another familial consideration is the doctor's evaluation of the effect a severely deformed child will have on a woman and her existing family. Both the degree of risk and the nature of the defect are factors traditionally considered by doctors in advising their patients whether an abortion may be medically necessary.[61] The enormous life-long impact of having such a child on the mother and the entire family is

---

which is, incidentally, very dangerous and can cause suffocation." (Belsky, T.3582, Pl. Exh. 152/T.3582, A.275.)

[60] A ten year study of 440 children born to women who had sought and were denied abortions and who had not aborted, concluded that the children born into this "potentially handicapping situation", suffer many disadvantages:

> The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer-group—all these point to a higher-risk situation for the child and the family, as well as for society. Dytrych, *et. al.*, *Children Born to Women Denied Abortion*, 7 Family Planning Perspectives 165 (1975) (Pl. Exh. 161, p. 171/T.3633.) *See also*, Forssman, *et. al.*, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused*, 42 Alta Psychiatrica Scandinavia 71 (1966), Pl. Exh. 163, p. 87/T.3633; Belsky, T.3633.

[61] *See Indications for Termination of Pregnancy*, a report by the British Medical Association, Pl. Exh. 3/T. 55.

undisputed.[62] Slip op. at 162. (Belsky, A.192; Tietze, A.201-05.)

The Hyde Amendments preclude abortions that are medically necessary because of fetal abnormalities. Slip op. at 30-1, 130. The trial court found that this absolute exlusion—"no matter how grave the abnormality nor how great its threat to the stability of the existing family . . ."—was one of the many ways in which the Hyde standard is even narrower than that legally available to women under the pre-1973 criminal abortion laws.[63] Slip op. at 130, 162.

The record shows that, to a certain extent, amniocentesis can predict fetal abnormality. It is now possible to diagnose chromosomal defects in the fetus.[64]

---

[62] Dr. Belsky described the intense suffering of one of her patients who was pregnant and who had two genetically defective children.

> [S]he was not schizophrenic but she was very depressed. She wanted very much to have a normal child. She described her experience with these two children. Liber syndrome is a severe disorder of the central nervous system and her babies were both blind and severely retarded, unable to recognize another human being, unable to sit up, talk or walk. One of them lived to be four and one lived to be two and a half and essentially they were vegetables. There was no meaningful existence, really, for these children or any maningful relationship with anybody else.
>
> I think the only reason they lived was because of her devoted care. They eventually died of pneumonia. . . . [S]he made the suicide attempt following the death of one of the children when her husband [and his] family blamed her for the disease and death of the child. (A.190-91.)

[63] A few states which adopted the Hyde standard explicitly added a category of state funded abortions for fetal deformities: Iowa, Maryland, and California. *See* n.14, *supra*.

[64] In 1974, 3,000 women used a test, amniocentesis, performed at 16 weeks of pregnancy, which identifies with 99.4% accuracy

(Tietze, A.205.) Scientific knowledge about damage to fetal development caused by drugs is growing. (Belsky, T.3620; Eliot, T.470.)

Even though rubella seemed not to qualify under the old New York life-saving abortion statute, doctors stretched the law to include these abortions. A woman who contracts rubella or German measles early in pregnancy faces an 80% risk that her child will be seriously defective. (Pl. Exh. 3, p. 175/T.55.) In New York City in 1964, the year of a rubella epidemic, 57% of abortions were for this reason.[65] (Pl. Exh. 10, p. 1/T.890.)

One type of abnormality which can be identified with certainty through amniocentesis is Tay Sachs disease. One out of every 15 Jews of Eastern European descent is a carrier. The children suffer and die a certain death. Dr. Tietze described the progress of this disease:

> The children are born normal. In fact it is said that they are particularly beautiful children and they seem to develop quite normally, but at six or nine months, things change . . . [at] 12 to 18 months the child is blind as well as completely

---

all recognized chromosomal abnormalities. (Pl. Exh. 263, p. 147.) That test is much more common today. Slip op. at 132.

[65] The rubella experience demonstrates the arbitrary enforcement of the pre-liberalization standards. The ratio of therapeutic abortions for rubella to 1,000 live births at private service hospitals from 1960-62 was .40 while at municipal hospitals it was only .03. (Pl. Exh. 10/T.890.) In Minnesota, which had a life-saving standard similar to New York (Minn. Stat. Ann. Penal Code § 617.18), Dr. Hodgson had been prosecuted and convicted in 1970 for performing an abortion on a woman who had contracted rubella. (T.39-40.)

paralyzed, but he usually continues to live for another few years. They are all dead by five years of age and preceding that, they have to go through a period where they require the most intensive care . . . . Eventually they . . . have convulsions which may come as often as every hour. It's an enormous problem, financial and emotional, for the parents as well as . . . a most miserable way of dying for the child. (A.202-03.) Slip op. at 132-33.

e. Poverty Is an Additional Factor Which May Be Medically Significant.

Although poverty alone does not make abortion medically necessary, the trial court found that "poverty is medically significant." Slip op. at 101. Physical and mental illnesses are more common among the poor. Slip op. at 101-02. (Bingham, A.184; Belsky, A.185; Eliot, T.407; A, Tietze, T.991,999.) It has also been proven statistically that maternal mortality is much higher among the non-white population.[66] Slip op. at 103. (Def.-Int. Exh. H, p. 17/T.2227.) The trial court found:

> The pregnant woman's poverty, both as it affects her general health and denies her the means of

[66] In 1972, the rate of maternal mortality for non-whites was 490% higher than for the corresponding white population. The difference declined until 1975 when the rate for non-whites was 76% greater than for white females. In 1976, the rate rose again to 327% higher than white females. (Def.-Int. Exh. H/T.2227, A.304.) As 39% of black women rely on Medicaid for their health care needs, compared to seven percent of white women, and the abortion to live birth ratio is nearly two times higher among blacks than whites, the health of black women will be disproportionately affected by the funding restrictions. (Pl. Exh. 24 p. 213/T.1534.)

> dealing with her pregnancy and its special problems and restrictions, increases her risks of health damage, and even of mortality, from the diseases and conditions that cause complications in the pregnancies of women generally. Slip op. at 103.

Poor women also have less access to alternative treatment for high risk pregnancies. Bed rest may be impossible for poor women who cannot afford either to leave their jobs or to pay for help with their chores or children. (Romney, T.3966; Pisani, T.2214-15.) *See* Facts, *infra* § 8.

f. Teenage Pregnancy and Childbearing Pose Significant Risks.

The trial court found that:

> Pregnant teenagers, particularly the younger teenagers, are a disadvantaged class, recognized by Congress; they are disadvantaged by the convergence in their unwanted pregnancies of physical and psychological immaturity, poverty and dependence, and a high risk of serious pregnancy-connected physical and psychological complications that threaten permanently to undermine the health of the pregnant teenagers and their fetuses. . . .No legislative interest outweighing the interest in the teenagers' health can be advanced to justify the discriminatory denial of necessary medical care. Slip op. at 315-16.

All of the problems created when a poor woman is denied Medicaid funding for abortion are magnified for poor pregnant teenagers, who accounted for one-third of Medicaid abortions before the Hyde Amendment took effect. (Hofman, T.1332; Pl. Exh. 21/R.110.) In

1976, the HEW Office of Child Health Affairs concluded that teenage pregnancy is "one of the most if not the most pressing health problem of individuals 19 years of age and under." A 1978 HEW Task Force report found it to be a "major public health problem with serious medical health, education, social, psychological and vocational implications for the mother and baby." [67] Slip op. at 134. (Pl. Exh. 253, p. 1.)

According to a study prepared by HEW in 1977 (the "Shuck Memorandum"), approximately 300,000 adolescents receive abortions annually—one half under the age of 17. Approximately 85,000 of these teenage abortions were funded by Medicaid. Slip op. at 135-36. (Pl. Exh. 244, p. 1.)

A recent comprehensive study of adolescent health found the consensus of medical experts to be that: "Girls are at increased risk biologically and emotionally if pregnancy occurs before they complete their own physical growth." Slip op. at 134-35. (Pl. Exh. 20, p. 17/T.1317; Hoffmann, T.1368.) Dr. Hofmann, the former President of the Society for Adolescent Medicine, testified that she would consider pregnancy "a pathological condition—in a broad definition of the word pathological . . . (physiologically) for the young group and emotionally for the total adolescent group." (T.1435-36.) Slip op. at 141-42.

[67] Teenage pregnancies now account for a larger proportion of all births in the U.S. than ever before. Menken, "The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing," 1977, (hereafter "Menken, 1977"), (Pl. Exh. 241, p. 1.) Although overall birth rates have declined, teenage birth rates have risen. Birth rates of girls 17 and under have risen particularly sharply. Between 1968 and 1973, the number of such births rose 25%. In contrast, during the same period total births *decreased* 10%. *Id.*

Fatal complications in pregnancy are 60% more likely for a girl under 15 than for a woman 20-24, and 13% more likely between the ages of 15 and 19. Slip op. at 137. (Pl. Exh. 21, p. 23/R.110; Hofmann, T.1346a.) Compared to women 20-24 years old, 15-19 year-olds can be twice as likely to suffer fatal complications as a result of hemorrhage, spontaneous abortion or toxemia. Under 15 they are 3.5 times more likely to die from toxemia. Slip op. at 137. (Pl. Exh. 21, p. 62/R.110; Hofmann, T.1346-48.)

The risks of severe but non-fatal complications of pregnancy, many of which permanently impair the young woman's future life, health, and reproductive capacity, are also significantly higher for teenagers.[68] HEW reports that "studies show pregnant adolescents have higher rates of toxemia, prolonged labor, premature delivery, pelvic disproportion, and Caesarean section than more mature women. Slip op. at 135. (Pl. Exh. 20, p. 17/T.1317; Hofmann, T.1345.)

The increased health risk to the adolescent can be partially attributed to her lack of physical maturation. Slip op. at 141-42. (Hofmann, A.210-11.) Dr. Hofmann testified that pregnancy during the critical growth period of puberty can actually impede physical growth, even if there are no complications. Slip op. at 144, 147. (Hofmann, A.211.)

Teenagers are further at risk in pregnancy due to their special vulnerability to specific health hazards.

[68] The increase in complications is enormous. For every 100 women between 20-25 who suffer toxemia or toxic anemia, 131 teenage girls will be afflicted by toxemia, 125 teenage girls will suffer from anemia for every 100 of the older group; and 113 teenagers will develop infections at the time of delivery for every 100 of the older group. (Pl. Exh. 21, A.260; Hofmann, T.1344.)

The Schuck Report summarizes some of those health problems to which teenagers are particularly sensitive:

> While adolescents are often characterized as a healthy group, they experience problems such as venereal disease, drug and alcohol abuse which threaten their well-being. The incidence of gonorrhea in adolescents at 15-19 is second only to those 20-24. In one national sample, 13.7 percent of adolescents reported that they were moderate to heavy drinkers—the same percentage as adults. (Pl. Exh. 244, p. 3.) *See also* slip op. at 138.

For poor pregnant teenagers, like their older counterparts, the jeopardy is even greater because poverty breeds poor health. *See infra* Section 5e. Moreover, health care services are not generally available to adolescents.[69] The trial court found, based on expert testimony and HEW documents that even the best prenatal care "has not been able to reduce adverse consequences of pregnancy to the same level as for older women . . . " (Pl. Exh. 244, p.4.)

The impact of pregnancy on adolescents is further compounded by the high incidence of rapid repeat pregnancies—about 44% of adolescents having first babies will have second pregnancies within a year.[70] Slip

[69] Teenagers are often unaware of their pregnancy because their menstrual cycle is irregular and they do not seek medical care until gestation is advanced. Slip op. at 142. (Hodgson, T.489-90; Romney, T.1140.) Fifty percent of adolescents receive no prenatal care in their first trimester; 10% do not receive any prenatal care before the third trimester. Slip op. at 142. Even those who do see physicians early in pregnancy find it difficult to comply with their doctor's suggestions regarding prenatal care. Slip op. at 143. (Hofmann, T.1343-44.)

[70] Plaintiff Mary Doe is 19 years old, and the mother of four children. She bore her first child at 14. (Doe Aff.,¶ 3, A.105.) The

op. at 136. Children born of adolescent mothers have a higher rate of infant mortality.[71] Furthermore, the trial court found that "children born of adolescent mothers are more likely to be premature and susceptible to birth defects, including mental retardation."[72] Slip op. at 162-63.

The trial court found "that teenage pregnancy imports high psychological stress for the adolescent." Slip op. at 144. Moreover, pregnancy and the profound responsibility of parenthood before the individual's emptional and psychological maturation process is complete can retard the young adolescent's achievement of full maturity. Slip op. at 143-44. (Hofmann, A.212-13.)

Depression is one of the primary symptoms, among "a host of serious emotional problems that occur with an unwanted pregnancy." (Hofmann, A.213.) One study revealed that there is a high correlation between unwanted pregnancy and suicide attempts by teenagers actually, or believing themselves to be, pregnant. (Pl. Exh. 23, p. 136/T.1377; Hofmann, A.213-14.)

HEW Report on Teenage Pregnancy states that the adverse effects of teenage pregnancies are multiplied when the second pregnancy occurs before a woman has reached 20 years of age. (Pl. Exh. 253, p. 6.)

[71] About six percent of first babies born to girls under 15 die in their first year, a rate 2.4 times higher than babies born to women in their early 20's. Babies born to 15-year-olds are twice as likely to die than babies born to mothers aged 20-21. (Pl. Exh. 21, A.260.) High mortality rate is related to prematurity, infection, and sudden infant death syndrome. (Hofmann, T.1356.)

[72] Low birth weight, a measure of prematurity, occurs with much greater frequency in infants of teenage mothers. Dr. Hofmann described it as the "single greatest risk to the fetus." (T.1351.) Prematurity is linked not only to high infant mortality but to neurological problems like epilepsy, brain damage, cerebral palsy, and mental retardation. Slip op. at 139-40.

For teenagers with pre-existing psychiatric illness such as 15-year-old plaintiff Ann Moe, unwanted pregnancy may lead to psychosis and, in addition, may preclude complete recovery forever. (Hodgson, Aff. 1/4/78, R.99, ¶ 1,7,8.)

For other teenagers, like plaintiffs Mary Doe and Susan Roe, an unwanted pregnancy, if not terminated, may be the factor which transforms a precarious and difficult life into one with which they are unable to cope either physically or mentally.[73] (Doe Aff., A.105-06; Roe Aff., A.123-24.)

6. The Hyde Amendment Is Impossible for Physicians to Apply, and Precludes the Exercise of Medical Judgment.

Both the original Hyde Amendment and the one in effect when the district court rules both required physicians to determine that the life of the pregnant woman "would be endangered if the fetus were carried to term." The trial court, concluded:

> The medical testimony requires the finding of fact that the life endangerment standard . . . is not a term used in the medical profession as a standard for determining medical procedures, and that it is not susceptible of any agreed definition among medical practitioners. Slip op. at 91.

[73] Psychological problems are aggravated by the social and educational effects of teenage pregnancies:

> Surveys indicate that between one-third and one-half of all adolescent females who drop out of school do so because of pregnancy or marriage. Early parenthood is a major reason for males to drop out of school.
>
> Adolescent parents run higher risks of unemployment and welfare dependence than those who delay their first child until their twenties. (Pl. Exh. 244, pp. 1-2.)

The court further found that:

> Restricting abortion alone of all medical procedures, to the life endangerment circumstance has no support in any medical evaluation of medical conditions and the medical procedures appropriate to the medical conditions; the physicians who reject all direct abortion do so on grounds other than a medical evaluation of condition and procedure. Slip op. at 320-21. *See also*, slip op. at 310.

Medical witnesses testified that this standard is both alien to the practice of medicine today[74] (slip op. at 91; Tietze, T.922; Hodgson, A.195-96; Romney, T.1063), and impossible to apply in the context of pregnancy. (Romney, A.217; Eliot, A.164; Hofmann, A.206-07.) They agreed that, with advanced technology and supervision, it is possible for women with life threatening conditions to survive pregnancy.[75] Slip op. at 90. However, ". . . the testimony rested on the assumption that the pregnant woman was desirous of bearing the child and was cooperative throughout the pregnancy." Slip op. at 91.

[74] The trial court found that the additional standard in the 1978 and 1979 Hyde Amendments "severe and long lasting physical health damage" adds no "added class of definable instances" (slip op. at 100), and it was not terminology familiar to the medical profession, as proven by the extreme "anomalies in classification shown by the statistics" (slip op. at 101), and despite the fact that Congress intended to add a definable class. Annex to slip op. at 236-37.

[75] Medical experts estimated that fewer than one-tenth of one percent to one percent of women who wanted to have a child, and were willing and able to follow any regime, would have to have abortions. (Bingham, A.184.)

The medical witnesses emphasized that the prognosis of any particular pregnancy is complex in light of the numerous dimensions to the life endangerment concept (slip op. at 91), including: the degree of risk to the woman's life; the probability of its eventuation; the relationship of a patient's condition to the available resources; and the patient's behavior in terms of her having the means and will to carry out the medical program. Slip op. at 92.

They testified that, despite the potential scope of "life-endangerment" there would be a reluctance to certify under such an alien standard. In fact, the trial court found that the "life-endangerment" exception has been interpreted more narrowly than the pre-1973 standards. Slip op. at 96.

a. It is Not Possible to Know Early in Pregnancy Whether a Woman's Life Will Be Endangered.

As noted, the Hyde Amendment precludes physicians from exercising medical judgment to certify abortions under Medicaid for physical, mental health or familial reasons. Although Hyde permits funding for terminating pregnancies that endanger the life of the woman, even that standard precludes the exercise of medical judgment in practice, because it requires virtual certainty. Although doctors can often determine early in pregnancy that continuation of the pregnancy will substantially increase the *risk* of life endangerment they cannot ordinarily certify that pregnancy will in fact endanger life until late in pregnancy, when it is too late to avoid or control the life-endangering complications, or when abortion itself would be very dangerous. In effect, Hyde precludes preventive medical practice, even when medically necessary, and requires

the woman and the physician to wait until there is no room left for medical judgment.

The trial court found that:

> There is a very large number of specifically pathological conditions that at some level of intensity and under some circumstances of treatment will jeopardize the health or life of a pregnant woman and indicate termination of the pregnancy as the medically most appropriate procedure. However, except for a few classic conditions, they are not characterized by that certainty of predictability that the Hyde-Conte amendment and its successors appear to require; in large part the conditions do not assume their definitely life-threatening or health destructive intensity until so late in pregnancy that abortion is no longer a safe procedure. Slip op. at 161.

No medical expert thought it possible to predict life-endangerment with certainty early in pregnancy. Dr. Romney testified that, despite the greater diagnostic tools and statistical evidence to draw upon, early prediction is very shaky in individual cases.[76] (A.216-17.) *See also*, Pisani, T.2206-09; Hofmann, T.1400, 1433.

---

[76] *See* Cates, *et al.*, *The Intrauterine Device and Deaths from Spontaneous Abortion*, New Eng. J. Pub. Med. 1155 (1976), reprinted by CDC, PHS, DHEW. (Pl. Exh. 213.) Doctors also questioned certifying, for example, patients with hypertension in stressful unwanted pregnancies who run a seven-fold risk of developing, late in pregnancy and despite treatment, pre-eclamptic toxemia, a leading cause of maternal deaths. (Sloan, A.173-74; Romney, T.3968-69.) On cross-examination of Dr. Hodgson, the United States Attorney suggested that she would have to monitor such a patient until she could say "she had a real chance of a fatal stroke or some other fatal condition." (T.70.)

Maternal mortality studies are important for two reasons.[77] First, they demonstrate that the leading causes of maternal deaths are conditions for which medical science cannot make the individual predictive judgments required by the Hyde Amendments. They also underscore the importance of legal abortions in reducing maternal mortality.[78] What they do not show are those deaths from pregnancy-related suicides and those deaths caused some time after childbirth by conditions aggravated by pregnancy and childbearing.

The studies show that throughout the 1960's and 1970's, the vast majority of maternal deaths were due to direct obstetric complications of pregnancy[79] as opposed to pre-existing diseases, aggravated by pregnancy or causes unrelated to pregnancy. (Def.-Int. Exh. M, p. 2; Def. Exh. J, p. 822/T.2227.) Hypertensive states of pregnancy—a leading cause of maternal mortality, and other conditions, do not arise until late in pregnancy.[80] The studies confirm the testimony of both parties' medical experts that it is impossible to make a definitive prediction early in pregnancy that a woman will or will not die from conditions which are the leading causes of pregnancy-related deaths.[81]

[77] These include: N.Y. Department of Health, *N.Y. State Maternal Mortality Study, 1970-76,* June 1977 (Def.-Int. Exh. H/T. 2227); Schaffner *et al., Maternal Mortality in Michigan: An Epidemiologic Analysis, 1950-75,* 67 A.J. Pub. Health 821 (1977) (Def.-Int. Exh. J/T.2227); *Minnesota Maternal Mortality Study, 1950-75* (Def. Exh. M); Data on Maternal Death, *Vital Statistics of the United States* (Pl. Exh. 261).

[78] Maternal mortality studies normally include deaths arising from abortion. In 1967, the total number of maternal deaths in the United States was 218. They declined to 157 in 1968, 154 in 1969, and 128 in 1970. In 1973, the year abortion became widely legalized, maternal deaths markedly decreased to 30. There were 24 in 1974, and 17 in 1975. The major factor in the reduction of deaths was the advent of legal abortions. Slip op. at 11. (Pl. Exh. 8A, p. 15.)

[79] "Direct maternal deaths" is the term used to describe obstetric complications of the pregnancy state or labor. "Indirect maternal death" occurs when pregnancy or labor is made fatal by an underlying condition such as diabetes *See* Def.-Int. Exh. H, p. 6, A.304; Def.-Int. Exh. J, p. 822/T.2227.

Predictability in the "large gray area" of borderline cases described by Dr. Romney and others, is virtually impossible. He described the unpredictability surrounding women "who are not totally healthy . . ., who have [an] acute or chronic disease" which is not of sufficient magnitude to clearly predict trouble. (T.1118-19.) Discussing the impossibility of predicting life-endangerment in the hypothetical case of a markedly obese woman seeking an early abortion, he said:

> I had no crystal ball which allowed me specifically to project the course . . . [the] pregnancy would

[80] A New York study of maternal deaths from 1970-76 shows that in each hypertensive state case, the condition did not appear until after the 20th week of gestation with the eclamptogenic process usually appearing later than the 25th week. A study of complete case records showed that even after death it was not possible to identify any prior medical history connected with the deaths of eight of the eleven women studied. (Def.-Int. Exh. H, p. 28/T.2227, A.306.) Defendant's expert Dr. Pisani stated that death from pulmonary embolism was not generally predictable in advance (T.2207) and is more likely to occur in a pregnancy carried to term than during a first trimester abortion (T.2208). He also testified that amniotic fluid embolism, another leading cause of death, does not occur in the first trimester and cannot be prediagnosed as it is ascertained only by autopsy. (T.2208-09.)

[81] The medical conditions which were certified under a "preserve life" standard in New York prior to 1970 were those pre-existing conditions, such as rheumatic heart disease, tumors, etc., that are classified as "indirect" causes of maternal deaths. (Pl. Exh. 10 Table 4/T.890, slip op. at 13-4.)

follow for any particular woman who was that markedly obese [and] at the time I saw her [said], "Doctor, under no conditions do I want to continue this pregnancy." That would create a problem for me because I couldn't look down the road and know whether she might develop ancillary complications that might threaten her.[82] (T.1214.)

Medical science can identify certain groups of women who run a substantially heightened risk of death from pregnancy and labor. Women under great stress and tension are more likely to die from hypertensive states of pregnancy than those who are not.[83] (Sloan, T.1641-51.) Black women who run disproportionate risks of mortality and morbidity in pregnancy suffer more frequently from hypertension. (Pisani, T.2212.)

Teenagers and older women also face substantially higher risks of maternal death than their 20-24 year-old counterparts. Slip op. at 137, 150.

The predictability of danger increases as pregnancy progresses, but, by the time a doctor can certify with

[82] Similarly, it is impossible to predict which individual with an IUD in place would be killed by infection later in pregnancy (Hodgson, A.197); likewise with the woman suffering from anemia (Romney, T.1160), severe varicose veins (Romney, T.1119, 3935-36), or cystitis which could cause a renal abscess late in pregnancy (Romney, T.1120).

[83] The availability of legal abortion not only virtually eliminates abortion-related mortality resulting principally from the complications of illegal and self-induced abortion, *see* n. 78, *supra*, but also accounts for a decrease in mortality among women who have a high risk of encountering serious problems by permitting them safely to discontinue an unwanted pregnancy they would otherwise have carried to term. Complications arising out of or exacerbated by the stress of unwanted pregnancy are reduced.

some certainty that a woman might die, it will probably be too late to save her by any medical intervention.[84]

b. The Hyde Amendment Standard Is Alien to Good Medical Practice and Has Inhibited Doctors' Treatment of Medicaid-Eligible Women.

The trial court found that:

> The evidence requires the conclusion that the medical profession will interpret and has interpreted the Hyde-Conte Amendment and its successors narrowly rather than attempt to demonstrate to DHEW the basis of their medical judgments in cases in which they are satisfied that abortions are medically necessary for the pregnant woman's health but in which they can have no confidence that they could produce clinical data demonstrating to the satisfaction of DHEW that certainty of life endangerment or of severe and long-lasting physical health damage that the enactments appear to require. Slip op. at 159-60.

To enhance predictability by waiting to see how pregnancy progresses was inimical to plaintiffs' witnesses' principles of good and appropriate medical care. (Romney, T. 1067-77; Rothschild, T.690-91.) Yet this is what the Hyde standard requires.

[84] The New York Study (Def-Int. Exh. H, p. 30/T.2227) reveals that emergency abortions had been performed for all 13 women who died from preeclampsia. The testimony confirmed that a woman can die of toxemia even with the best medical care. (Hofmann, T.1433.) Similarly, a late abortion does not resolve the danger created by pulmonary or amniotic fluid embolism. Nor can a late abortion or treatment counteract the rapid infection resulting from an IUD *in situ* (Hodgson, A.197).

The trial court found:

> The supporting data for safe certification cannot be at hand at the time when professional judgment would approve a termination of the pregnancy as "medically necessary," as that term is understood in the medical profession. The effect tends to be to relegate abortion to the status of a crisis intervention procedure. Slip op. at 110.

The statistics confirm that Medicaid abortions under the Hyde standard have been limited to crisis situations. Slip op. at 158-59. Behind those statistics lie the real problems of plaintiff class members for whom the denial of abortions may result not only in increased risks, but, in some cases, permanent health damage.[85] Serious complications arise from delay because it both increases the risk of the abortion itself and exacerbates the risks of the underlying condition. Slip op. at 113-14, 161.

The trial court found that the inhibiting effect of the Hyde Amendment resulted in

> . . . the very substantial risk that professional reluctance to certify under a standard alien to medical experience and terminology would deny medical assistance to women in instances in which

[85] A Texas Medicaid-eligible teenager was turned down by the state for an abortion because she had not reached the crisis point. This 15-year-old girl with chronic glomerulonephritis applied for prior approval pursuant to state law through her doctor, Dudley Powell. Two doctors agreed that this condition, a kidney disease, made her pregnancy life-threatening. Their request was denied, evidently because chronic glomerulonephritis was not considered a condition which would "endanger the mother's life if the fetus were carried to term." (Pl. Exh. 455A-D, A.300-303.)

> it would not have been withheld under the older abortion committee standards. Slip op. at 99-100.

Therapeutic abortion certifications under state laws before 1973, such as the "preserve life" standard in New York, were found relevant by the trial court for two reasons. First, testimony and studies on those certifications show that they were made arbitrarily, depending on the status of the doctor and the wealth of the patient, not on an expected difference based on individual doctors' medical judgments.[86] (Tietze, T.899, 917; Romney, A.217; Pl. Exh. 10/Table 2/T.890.) Some hospitals even had abortion quotas, irrespective of need. (Tietze, T.938.)

Second, the trial court found that the Hyde standards signaled a return to a practice even narrower than these arbitrary standards. Slip op. at 159.

Medical testimony was in agreement on the inhibiting effect of the Hyde standards on doctors, standards requiring doctors to single out abortion and treat their poor pregnant patients differently than any other Medicaid or private patient. (Romney, T.1155-66; Eliot, A.164.)

[86] Even in the same hospital, private patients were about four times as likely to get certified for medical non-psychiatric conditions than the poor. In 1964, at University Hospital, there were 14 times more certifications for rubella than at Bellevue, the public part of the hospital, yet admittedly the poor suffer more from the certifiable conditions. (Belsky, T.3523.) *See* slip op. at 13.

7. The "Medically Necessary" Standard Is Understood by the Medical Profession.

The trial court found that:

> The medical evidence made it abundantly clear that the medical profession does not treat pregnancy, the threat of complications in pregnancy, and the factor of the pregnant woman's attitude toward her pregnancy and child bearing in terms related to determining whether the "life of the mother would be endangered if the fetus were carried to term." Slip op. at 95.

The witnesses agreed, and the trial court found, that a "medically necessary" standard did allow doctors the scope to exercise their best medical judgment. Slip op. at 88-89. (Rothschild, A.148, T.709-10; Romney, A.215-16; Eliot, A.161; Belsky, T.3570.) The evidence shows that the medical necessity standard approved in *Doe v. Bolton* and *Beal v. Doe* is in fact the standard applied by the medical profession to their general practice and to pregnancy in particular. Slip op. at 88-89, 101. (Belsky, T.3570; Rothschild, T.709-10.) The *Doe v. Bolton* formulation of the medical necessity standard promotes the exercise of good medical judgment in three crucial ways: (1) it permits a comprehensive evaluation of all factors affecting health; (2) it embodies the essential principles of preventive medicine;[87] and

[87] A witness used the example of a teenager with strep throat. Penicillin would cure it but it is also probable that it would get better without treatment. If penicillin is not given, there is a risk of rheumatic fever. This, too, could be self-correcting, or it could produce heart damage that would shorten life by 20 years. (Hofmann, A.207-08.)

(3) it allows flexibility in weighing the risks and benefits of medical intervention.[88]

8. There Are No Alternatives For Poor Women Who Need Medically Necessary Abortions.

Poor women seeking to avoid health threatening pregnancies cannot depend on contraception. Those methods most effective in preventing pregnancy present the greatest danger to health.[89] Without abortion as a back-up for contraceptive failure, poor women will be pressured into foregoing safety for effectiveness[90] or submitting to irreversible sterilization, which

[88] The trial court found that even those doctors who testified for the intervenor, who oppose abortion on principle, do not disagree "that from a therapeutic viewpoint abortion would be medically necessary to preserve the pregnant woman's health in significant classes of cases falling outside the classes delineated in the successive Hyde Amendments." Slip op. at 310.

[89] A leading study shows that people who use various methods of contraception run the following risks of unintended pregnancy during the first year: oral contraceptives, 6%; IUD, 12%; condom, 18%; diaphragm, 23%; foam, 31%; rhythmn, 33%. *See* Pl. Exh. 27/T.1567, A.266. However, the two most effective methods are also the most dangerous, with mortality from the pill being 58.4 deaths per 100,000 pill users aged 40-44 who smoke. The IUD mortality rate is about 1 per 100,000 users, a rate that is biased downward since it is estimated that most unwanted pregnancies with an IUD *in utero* were terminated by legal abortion in the first trimester. *See* Pl. Exh. 16, Table 1/T.970-71.

[90] Dr. Hodgson testified about a mother of three who had cancer with a prognosis of five years to live. She became pregnant using a diaphragm and could not use the pill since it could accelerate the cancer. (T.37.) Women who are smokers, obese, or who have high blood pressure are also warned against the pill. On the basis of all the data, Dr. Tietze concluded that in terms of risk of life the safest procedures for regulating fertility were use of the diaphragm and condom, which are "perfectly safe, although not 100% effective—and the termination of pregnancies resulting from contraception failure. . . ." (Tietze, T.971; Pl. Exh. 16, p. 3/T.970-71.)

they may not freely choose, but which is federally funded.[91] (Sloan, T.1675-76.)

Medicaid women who need medically necessary abortions have few options. A few may qualify for Medicaid abortions under the life-endangering standard, but not until it is "crisis intervention." Slip op. at 159, 110. The trial court found that the delay inherent in a doctor marshalling evidence and monitoring pregnancy until the woman's life is "endangered" would increase serious complications.[92] Slip op. at 97. (Romney, A.218.)

Women denied Medicaid abortions are left few choices. They may undergo a great sacrifice to pay for a legal abortion and suffer the increased risk of the delay in raising funds. They may jeopardize their lives by self-abortion or illegal abortion. Or they may unwillingly continue an abnormal pregnancy which, as it

[91] The Department of HEW has recently issued new regulations to prevent situations of sterilization abuse on Medicaid women. 45 C.F.R. 205.35. Before 1973, approval by hospital abortion committees was often conditioned on the woman's agreement to have a concurrent sterilization operation. (Pl. Exh. 289, p. 93; Eliot, T.476.) *See* also Brief of *Amici Curiae* National Lawyers Guild, *et al.*

[92] This finding by the trial court was supported not only by expert testimony but by Dr. Tietze's description of the experience in Sweden, where in 1938 the law allowed abortion only where it was necessary to avert a serious threat to the woman's life or health due to disease, physical impairment or weakness. (Pl. Exh. 8, p. 55/T.885.) Swedish doctors interpreted the law as requiring that they monitor patients to see whether problems in fact developed. (T.1009.) The result was that by 1968, 57% of the abortions in Sweden were done in the second trimester, and the mortality for legal abortion was greater than the mortality for childbirth. The law was then changed. Subsequently, 90% of abortions were done in the first trimester with a dramatic morbidity and mortality reduction. (T.1010.)

progresses, increases the risks to their life and health. Each of these options increases the risks to the lives and health of women denied medically necessary abortions.

The chair of an HEW Task Force directed to find alternatives to abortion concluded:

> [Abortion] is an option, uniquely, which is exercised between conception and live birth. As such, the literal alternatives to it are suicide, motherhood, and, some would add, madness. (Pl. Exh. 248, A.299.)

The trial court concluded that "[i]ndigent women, dependent on public assistance provided through AFDC programs are dependent on Medicaid. . .for legal abortions." Slip op. at 75. Even in states where the welfare allotment is above the national average, welfare recipients "must live at a miserable and humiliating level of bare subsistence." Slip op. at 76-77. (Dweck, T.1791-93.) The cost of a safe, legal abortion is beyond the means of most poor women. In 1976, the average cost of an abortion ($280) exceeded the average *monthly* AFDC payment for a *family of four* ($238) by $42. (Pl. Exh. 24/T.1534; A.264.) The average cost of an abortion to a Medicaid woman is even greater since Medicaid women are three times more likely to rely on hospitals for their general medical care (slip op. at 76), and women seeking medically necessary abortions, particularly teenagers, are more likely to require a more costly second trimester abortion.[93] Slip op. at 76. (Romney, A.221-22.)

[93] The cost of second trimester abortions performed in hospitals ranges from $350 to $1,000 or more, thus foreclosing the possibility for such abortions for most poor women. (Kissling, T.1453.)

Even a doctor who will perform an abortion without charge is often limited by the hospital's refusal to admit a patient without prepayment or a prior guarantee of payment, as with cases of plaintiffs Ann Moe and Mary Doe. (Bingham, A.183; Hodgson, A.196.)

An indigent woman cannot depend on philanthropic or charitable institutions to assist her in obtaining an abortion. The district court specifically found that abortions are not generally available at free public hospitals or through philanthropic assistance, or at reduced clinical charges. Slip op. at 74-75. Although providers do perform some free or reduced fee services, they can do so for only a very few Medicaid recipients denied medically necessary abortions. Slip op. at 77-78. (Kissling, T.1482.)

Faced with the utter inaccessibility of legal abortion, a woman may use her family's meager stipend to obtain an abortion, or try to raise the money herself. *See* n. 35, *supra*.

Women whose lives and health are most endangered by unwanted pregnancies are least likely to be able to raise private funds or to ferret out the scarce charitable resources to fund a legal abortion. Teenagers are financially dependent on their families, whom they often cannot tell about their pregnancy, and they are not likely to have outside sources of income. Fifteen-year-old plaintiff Ann Moe, with a history of mental instability, institutionalized for most of the three years prior to her pregnancy, would hardly be capable of aggressively searching out alternatives to fund a legal abortion. A young girl already traumatized by rape or incest, or in fact a woman of any age with serious mental problems, would hardly be expected to deal

with the additional pressure of raising funds for a legal abortion.

Failing to obtain the money to finance a legal abortion, women may be forced to undergo self-abortion or non-legal abortion. Women obtaining illegal abortions today are exposed to higher risks than women who obtained them in the 1960's. (Tietze, A.198.) (*See* Section C-3, *supra*.)

Women denied medically necessary abortions are likely to be at an advanced stage of pregnancy by the time they try to self-abort or seek out a non-legal abortion, and thus face even greater risks than at earlier stages. *See* slip op. at 104-10; and Section C-3, *supra*.

Adoption is at best a desperate alternative of last resort. Even in a normal pregnancy it is a painful and often unavailable option to poor women.[94] Katherine Krauser, an AFDC mother of five, testified that despite her decision to give up her baby for adoption at birth, Ms. Krauser could not relinquish the infant when a woman arrived at her home four months later to claim "baby Krauser." (A.178.) Although she had had three unwanted pregnancies, she felt that giving up her children for adoption was an unacceptable option: it would be "like selling them on the slave market." (T.1761.)

---

[94] The children of Medicaid women are not the most likely to be adopted. They are likely to be bounced "from foster home to foster home, and from institution to institution." Hofmann, T.1386. HEW reports indicate that as many as 350,000 children are in foster care, including 90,000-120,000 with special needs. (Pl. Exh. 287, p. 1.)

Dr. Judith Belsky gave testimony concerning patients who had both had an abortion and given up a baby for adoption. "They said giving up the baby for adoption was much worse. Whatever guilt . . . they had about the abortion they got over, but that they never could get over the sense of loss of the child they had given away. . . ." (A.192-93.) For women who know their child will be deformed or genetically impaired, adoption is not an option. Nor is it an option for teenagers at great physical and emotional risk in pregnancy, whose children are more likely to be born with physical and mental defects. Slip op. at 139-40. In fact, the Schuck Report indicates that 85% of teenage mothers keep their children. (Pl. Exh. 244, p. 3.)

The absence of government funding for medically necessary abortions for many women does not lead to normal childbirth but to physical and mental suffering, or possibly death. They may bear severely defective children doomed to lead short and painful lives, or to live their lives in institutions or as agonizing burdens to their parents and existing families. Surely this suffering of poor women and their children cannot be said to encourage normal childbirth.

9. Abortion is a Matter of Religious and Conscientious Belief as to Which Regligions Are Deeply and Irreconcilably Divided.

The explanation for the terrible toll on poor women's health exacted by the Hyde Amendments can be found in neither medical, fiscal nor demographic considerations; rather the Hyde Amendments reflect the fundamental religious division in our society over the morality of abortion and the proper role of civil law in the

face of religious dispute on a matter of private conscientious decision.

At the heart of the abortion controversy is a confrontation over religious faith and moral conviction on a matter of ultimate concern. As the district court found, "the issue is one involving moral principle and resting on religious teaching." Slip op. at 238. The differing beliefs, grounded in Scripture and moral reasoning, are "identifiably religious and constitute an integral element of denominational religious difference." Slip op. at 238.

The differences turn not on science or medical fact, but on "considerations of divine purpose . . ., the divine relation to the creation of life," (slip op. at 239) and of the role of the individual in shaping the divine plan and determining the fundamental question of human existence and human fulfillment.

Those who adhere to the anti-abortion view share the Creationist perspective, viewing the fetus as created by God at the "moment" of conception and confering ultimate value on the fertilized egg. By contrast, the pro-choice view holds that, though life is a gift of God, the decision whether to bring a life into the world is confided to the conscience of the pregnant woman. She decides according to her interpretation of God's purposes and her ultimate moral and ethical precepts. Whether described as religious or moral, "all the views are rooted firmly in religion, in belief in God's will, in God as the author of life, and in God's concern with humankind." Slip op. at 239.

The two views lead to diametrically opposed approaches to the role of law. The Creationists oppose legal abortion because it transgresses natural law,

divine in origin. They would have civil law impose this view on all women. The pro-choice view rejects as intolerable a rule of law that conflicts with or intrudes upon "the rule of conduct that moral theology explicates." Slip op. at 240. They insist that civil law leave to women the decision to choose or never to consider abortion, in accordance with their individual consciences and religious beliefs.

The differences among the denominations demonstrate: (1) that the abortion question is one upon which religions are irreconcilably divided; and (2) that the decision or non-decision in respect to abortion is one which, by its nature, inheres in the realm of the free exercise of religion and conscience.

a. Theological Positions Opposed to Abortion

i. The Roman Catholic Doctrine

The largest, most powerful and active denomination condemning abortion is the Roman Catholic Church. Abortion is a grave sin punished by automatic excommunication. (Smith, T.2117-2118.) The Declaration on Abortion issued in 1974 by the Sacred Congregation for the Doctrine of the Faith, is the Church's most definitive and authoritative statement on the morality of abortion. Slip op. at 169. (Def.-Int. Exh. E/T.2100-2102.)

Citing Scripture, Church teachings and moral reason, the Declaration grounds the impermissibility of abortion on the belief that human life begins with fertilization. (*Id.* pp. 2-3.)[95] The humanity and inviola-

[95] The term "human life" is used here, as it is in doctrine, as indicating equivalence to a born human being. Intervenors' witness Father William B. Smith testified that the fetus is "human life with potential, but if potential as against actual, it is an actual human life. If it is potential, it is not actual." (Smith, T.2128.)

bility of the fertilized egg is based neither on science nor on a certainty that the soul is infused at the first moment, but on theological doubt as to animation. It is a matter of " 'moral affirmation' . . . independent of the philosophical problem" of ensoulment. Slip op. at 171.

The scientific discovery that the genetic code is established at fertilization merely confirms the Church's teaching:

> [I]t is not up to biological sciences to make a definitive judgment on questions which are properly philosophical and moral, such as the moment when a human person is constituted or the legitimacy of abortion. From a moral point of view this is certain: even if a doubt existed concerning whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder. "The one who will be a man is already one." (Def.-Int. Exh. E, p. 6/T.2100-2102.)

As the district court explained: "[r]ational analysis and biological learning may, in the teaching of the Declaration, suffice to impose the same obligation to respect human life, but the obligation is seen nonetheless as religiously imposed." Slip op. at 228.

"Roman Catholic doctrine puts on the embryo and fetus a value equivalent to that placed on the life of born human beings, ignoring its futurity as irrelevant to a value analysis determined by considerations of divine purpose and of the divine relation to the crea-

tion of life." Slip op. at 239. The Declaration recognizes no justification for abortion—not even the life of the pregnant women. Slip op. at 169. (Def.-Int. Exh. E, p.6/T.2100.)

Catholic teaching distinguishes "indirect" abortion, i.e., "operations, treatments and medications which do not directly intend termination of pregnancy, but which have as their purpose the cure of a proportionately serious pathological condition of the mother . . . when they cannot be safely postponed until the fetus is viable . . . ." Slip op. at 171-72. The double effect principle does not justify abortion to save the woman's life but does encompass a number of life-threatening circumstances (*see* slip op. at 172-73), as well as removal of an ectopic pregnancy. Doctrine also permits immediate treatment of rape and incest victims so long as the treatment occurs to prevent conception. Slip op. at 173.

Roman Catholic doctors and nurses may not participate in abortions and to be compelled to do so would be a violation of conscience. Slip op. at 174. (Smith, T.2129-30.) Father Smith testified that a Medicaid program which reversed the terms of the Hyde Amendments, excluding childbirth services while funding abortion, would impede a poor Catholic woman's free exercise of religion. (Smith, T.2131-36, A.231-33.)[96]

[96] The Pastoral Letter "Human Life in Our Day", issued by the National Conference of Catholic Bishops in 1968, likewise insisted, with respect to family planning programs, that society should "never dictate, directly or indirectly, recourse to the prevention of life or to its destruction in any of its phases." Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 93rd Cong., 2nd Sess., on S.J. Res. 119 and S.J. Res. 130, Vol. I (Abortion—Part 1) (1974) (hereinafter Abortion Hearings I), p. 318.

However, Father Smith also testified that Catholics must pay taxes, even if a portion is used for what the Church considers immoral purposes. (Smith, T.2113-14.)

ii. The Mormon Church

The Church of Jesus Christ of Latter Day Saints, the Mormon Church, views abortion as "a revolting and sinful practice," subject to disciplinary action by "church councils as the circumstances warrant." Abortion is permitted in "rare" circumstances where medical counsel confirms that "life or good health of the mother is seriously endangered or where the pregnancy was caused by rape and produces serious emotional trauma in the mother." Counseling with presiding priesthood authority for the purpose of receiving "divine confirmation through prayer" is required prior to the abortion. (Abortion Hearings I, p. 318.)

iii. The Position of the Lutheran Church—Missouri Synod

As the only Lutheran sect to oppose abortion, the Synod expounds the view, derived from Scripture, that "life comes into being by an act that shares in the creation power of God," and that nascent life—established at the blastocyst stage—derives value because it stands in eternal relationship to God. (Abortion Hearings I, p. 321.) Slip op. at 177. The woman's life takes precedence, however, over nascent life. Though broader than the Roman Catholic, this exception is regarded as "indirect abortion" because it is "a consequence of an action undertaken to preserve life." Slip op. at 177. (Abortion Hearings I, p. 321.)

iv. Orthodox Jewish Teaching

The Orthodox Jewish position views abortion as akin to homicide, but as justifiable killing in self-defense where the pregnant woman's life is threatened. Slip op. at 175. This warrant for abortion, grounded in the Talmud, embraces both physical and psychological (suicidal) threats to life, (Feldman, T.1863-4), and includes certain cases of rape. Slip op. at 176. In life-threatening circumstances abortion is mandatory until the head of the fetus emerges. Many Orthodox Jewish theologians feel, however, that at some point early in gestation ". . . the fetus is to all intents and purposes a human being insofar as questions concerning destruction of the fetus are concerned." (Abortion Hearings I, p. 316, Rabbi David Bleich.) Slip op. at 176.

b. Theological Positions Viewing the Abortion Right as a Matter of Religious Liberty

In the past two decades, many religious bodies have officially affirmed their view that the right to terminate a pregnancy is a necessary and sacred aspect of religious decisionmaking and religious practice.[97] There are three major theological approaches among the pro-choice denominations.

---

[97] Among the denominational groups which have taken stands recognizing abortion as a matter of conscientious decision and religious liberty are all the eight major Baptist denominations, see § iii at n.101, *infra*, the Division of Homeland Ministries of the Christian Church (Disciples of Christ), the Board of Homeland Ministries of the United Church of Christ, the United Methodist Church, the American Ethical Union, the United Presbyterian Church in the U.S.A., the Lutheran Church in America, the American Humanist Association, the Moravian Church in America, the Church of the Brethren, the Unitarian Universalists, the Reorganized Church of the Latter Day Saints, the Reformed Church in America, the American Jewish Congress, Catholics for a Free Choice, Union of American Hebrew Congregations, United Synagogue of America, Young Women's Christian Association, Commission of Social Action of Reform Judaism, Church Women United, Women of the Episcopal Church, and the Friends Committee on National Legislation, Pl. Exh. 320/R. 233, Cong. Rec. daily ed. S.14564-65, August 26, 1979. In this case, the Women's Division of the Board of Global Ministries of the United Methodist Church intervened as plaintiffs "on behalf of itself and the membership of United Methodist women." (Hoover Aff., ¶ 1,A.129.)

i. Conservative and Reform Jewish Teaching

As explained by plaintiffs-appellees' witness, Rabbi David M. Feldman, Conservative and Reform Judaism follow the more liberal tradition in Jewish law and permit abortion where the woman's physical or mental health is threatened and may even mandate it in life-threatening situations.[98] The line between mandatory and permitted abortions is not a sharp one, however. Where abortion is permitted, it is, as "an outgrowth of the whole Jewish tradition . . . recommended," even if not strictly mandated. (Feldman, T.1930-31, 1935-36.) The governing principle is that the woman's "welfare is primary and her statement of her welfare is primary." (Feldman, T.1875-76.) Slip op. at 181. Where abortion is necessary to preserve life or health, it is a religious duty equally or even more important to the practice of the faith than the observance of ritual. Slip op. at 181. (Feldman, T.1877-80, 1916-17.)

The liberal Jewish tradition recognizes a broad range of circumstances where abortion is warranted, including the pregnancy of a very young teenager, or a pregnancy which threatens the nurture of existing

---

[98] This view is embodied in the resolution of the Biennial Convention of the United Synagogue of America which reflects as well the views of the Law Committee of the Rabbinical Assembly. Slip op. at 182. (Pl. Exh. 320/R. 233.)

children, or extreme pain in childbirth. Where the woman is suffering mental anguish over the possibility of bearing a defective child, she may abort even though that possibility alone would not warrant abortion. Abortion is also permitted to prevent anguish over bearing a child out-of-wedlock. Slip op. at 179-80. (Feldman, T.1865-74.)

The primacy accorded the woman's health and welfare flows from two basic teachings: the Biblical injunction to "choose life" (T.1907), which, in most cases, places preservation of one's health above even the commands of the Torah, slip op. at 178-79 (T.1859); and the principle that the fetus is only potential life until birth. Slip op. at 181. (Feldman, T.1858.) Rabbi Feldman described this principle as "immutable" (T.1922) because "the point when biological life passes from potential human life to human life has got to be a metaphysical, religious, philosophic determination rather than a medical, biological or even a legal one." (Feldman, A.223.) Because the Hyde Amendment creates a serious obstacle to a poor Jewish woman's access to abortion, it interferes with her ability freely to exercise her religious choice. (Feldman, T.1935-36.)

ii. The Mainstream Protestant Perspective

Dean Philip J. Wogaman, a United Methodist minister and recent past president of the Society of Christian Ethicists, explained that it is generally accepted among mainstream Protestant denominations and ethicists and others that "nearly no aspect of life is more sacred, closer to being human in relation to God than bringing new life into the world to share in the gift of God's grace and God's covenant." Slip op. at 192-93. (Wogaman, T.1959.) There is a duty, founded in the Bible as interpreted through the person of Jesus Christ, to make a deliberate decision about child-bearing according to the principles of responsible parenthood. One must consider whether one "is bringing a life into the world under conditions which make it possible for that life to participate in God's intention . . . [and under conditions which will not] threaten to undermine the theologically understood fulfillment of already existing human beings." Slip op. at 193-94.

Though there are no categorical rules (Wogaman, T.1966), there are many circumstances in which it might be contrary to God's purposes to bear a child: where there is risk to the life or physical or mental health of the woman or capacity of the future child; where, as in the case of some teenagers, the new life might not receive the nurture necessary for human fulfillment; where the pregnancy is close to menopause and would adversely affect the woman or her existing family and the social situation of the child; where the pregnancy results from rape or incest; or where the socio-economic condition of the family makes it impossible to nurture the new life emotionally and spiritually as well as physically.[99]

Abortion may be "mandatory as a person's responsibility before God" (Wogaman, T.2033), and that judgment is "referred to the woman and her own religious conscience." Slip op. at 197. The decision of responsible parenthood involves a religious duty of the highest order, transcending that of ritualistic practice. (Wogaman, A.223-24.)

---

[99] Slip op. at 194-95; *see also* Pl. Exh. 320/R.233; Statements of United Presbyterian Church, U.S.A.: Women's Division, Board of Global Ministries, United Methodist Church; Lutheran Church in America; and the Presbyterian Church in the United States.

Concern for the fetus is always subordinated to concern for existing human life. It is generally accepted that "human personhood in the sense in which the person receives its maximum value in relation to the Christian faith—does not exist in the earlier phases of pregnancy . . . .[T]he degree of sanctity or value ascribed to fetal life increases correspondingly to the stages of fetal development." Slip op. at 195-96. (Wogaman, T.1984.) Some Protestant theologians accept the Jewish view that personhood is not attained until birth. (Wogaman, T.2072.)

The operative consideration is not biological, however. Virtually all theologians and ethicists share the view that biology does not confer value but that "the value of the entity arises from its relation to ultimate reality" and that this "value question is one of moral judgment and ultimately religious in origin." Slip op. at 198.[100]

Dean Wogaman described the Hyde Amendment as denying or impeding the exercise of the duty of responsible parenthood. The Amendments invade the realm of free exercise because "[t]he concern here is the whole fabric or conditions of human existence" not limited simply to the case of risk to the health of the mother. (Wogaman, T.1972-73.)

---

[100] Dean Wogaman's own view illustrates the relationship between science and moral judgment. For him, personhood, which does not preclude abortion but enhances its gravity, does not begin until the fetus is capable of awareness, since "the covenant relationship, . . . which defines the very essence and heart of our faith, . . . is something which occurs between God as the Creator of reality and those who have begun to experience the reality which God has created." (Wogaman, T.1985.)

Because personhood is ultimately a moral rather than a biological determination, technological viability does not determine value although today it corresponds roughly to the dawning of awareness. Thus, technological developments advancing the point of viability would not alter the duty to make a decision of responsible parenthood. (Wogaman, A.226-27.)

iii. The Baptist Perspective

Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs,[101] testified that there is no distinct Baptist discipline or norm applicable to abortion. Slip op. at 183-84. Decisions about procreation are matters of conscience because bringing a life into the world is "a moral decision [which] comes out of some sense of moral awareness [and] . . . takes on real religious meaning because it is being absolutized as an ultimate, a supreme obligation." (Wood, T.3184; A.238.) Slip op. at 184-85. Voluntarism in matters of faith or ultimate concern, i.e., liberty of conscience, is itself "the most precious single principle for the Baptist understanding of religious faith and in particular Christian faith." (Wood, T.3181-83.) Slip op. at 184.

Baptists believe that the right of individual conscientious decision on the question of abortion is universal. It is a religious matter for everyone because it involves a sense of the sacred, of ultimate concern, and moral imperatives which are, or function for the individual as, divine commands. (Wood, T.3181-85, 3212-

---

[101] The Baptist Joint Committee is composed of eight bodies: the American Baptist Churches in the U.S.A.; the Baptist General Conference; the National Baptist Convention, Inc.; the National Baptist Convention of America; the North American Baptist Conference; the Progressive National Baptist Convention; the Southern Baptist Convention; and the Seventh Day Baptist General Conference. These groups have a combined membership of 30 million people. (Wood, T.3177-78.)

20, 3244-45.) Conscience dictates what value is ascribed to fetal life[102] as well as what considerations justify abortion, whether as an affirmative or reluctant moral necessity.[103]

The Baptist bodies generally view abortion as acceptable in varying degrees in situations where pregnancy is involuntary, due to not only rape and incest but extreme youth and contraceptive failure; is threatening to the mental, emotional and physical health of the woman; or unwanted for a wide range of reasons, including significant familial considerations. Slip op. at 191.[104]

Notwithstanding that various Baptist bodies hold differing views about fetal life and acceptable indications for abortion,[105] they agree that public policy must allow persons to make the abortion decision for themselves and provide access to medical services in accordance with the decision. Slip op. at 184.[106] Dr. Wood viewed the withholding of funds for abortion, in the context of a comprehensive medical service program, as a "gross entanglement of institutional government into the moral and religious values of the people of this country" (Wood, T.3278-80), and described the riders as placing a "stigma, not only on poor women, but on all citizens." (T.3222.)

[102] Dr. Wood emphasized his agreement with the principle that the attribution to the fetus of the value of human life is not a biological judgment, but rather a moral judgment. (Wood, T.3210, 3241, 3308-10.)

[103] In response to the U.S. Attorney's suggestion that some women would not take the decision seriously enough to qualify it as religious, Dr. Wood stated that "Government does not have the kind of competency to determine the depth or degree of soul searching, the extent of anguish and pain that persons experience to arrive at that point of decision-making." (Wood, A.245.)

[104] Wood, T.3237-38; Pl. Exhs. 131, 132/T.3173-74.

[105] *See* slip op. at 185-90. (Pl. Exh. 132/T.3173.) For example, the Baptist General Convention of Texas, the largest component of the Southern Baptist Convention, urged "[r]ecogni[tion] that Christian Love at times dictates an affirmative action against an attitude of 'doing nothing'" (Pl. Exh. 132/T.3173), whereas the Southern Baptist Convention has reaffirmed the Biblical sacredness and dignity of all human life "including fetal life." Slip op. at 189. Dr. Wood testified that it is absolutely incomprehensible to him to think of the fetus as human life or a person until birth. (Wood, T.3241-43.)

c. Dissent Within the Denominations

The district court properly found that there is no unanimity within any of the denominations. Slip op. at 166-67. The intra-religious differences, like the inter-religious ones, however, are theological and ultimate in dimension.

Among Baptists, for example, the organization "Baptists for Life" shares the Catholic view that from conception the fetus is an innocent, actual human being and that abortion is, therefore, tantamount to murder. (Pl. Exh. 139/T.3216, A.316.) Dr. Wood testified that all the Baptist publications and statements he had ever read opposing legal abortion articulated their opposition in very religious terms citing Scripture and religious principles.[107] (A.241-42.)

[106] The Southern Baptist Convention recently rejected one resolution describing the fetus as "an innocent human being" and another opposing permissive abortion legislation. Slip op. at 189-90. While registering its disapproval of abortion, the body reaffirmed its position on the "limited role of government in dealing with matters related to abortion." (Pl. Exh. 134 and 135/T.3193.) Dr. Wood characterized this as an affirmation of freedom of conscience, irrespective of moral condonation or condemnation of abortion. Slip op. at 188-90. (Wood, T.3201-03.)

[107] He provided several letters as examples, one which declares opposition to a constitutional amendment to be "totally contrary

The defendant-intervenors' witness, Paul Ramsey, also a United Methodist theologian, held a much stricter view on the acceptability of abortion than that explained as mainstream by Dean Wogaman. Slip op. at 198-99. (Ramsey, T.2362.) The fundamentalist Protestant or Scriptural literalist approach also generally condemns abortion.[108] (Pl. Exh. 456/R.233, A.327.)

Perhaps the greatest division exists within the most active anti-abortion denomination, the Roman Catholic Church. Several Catholic ethicists have asserted the conscientious nature of the abortion decision. (Pl. Exh. 36/T.2016, A.307.) The very existence of a small national organization called "Catholics For a Free Choice" (Pl. Exh. 320/R. 233) and church statements themselves further evidence dissent among Catholics.[109]

---

to the teaching of God's Word and also . . . the truth of Bible-believing Christianity"; and another which exhorts that no one who has studied the evidence of fetal development and "meanwhile studied the Bible, cried out to God and called for Prayer Meeting" can speak in favor of abortion. (Pl. Exh. 138/T.3213-14, A.318; Pl. Exh. 137/T.3213-14, A.317.)

[108] The Right to Life Society of Greenville, Mississippi urges "true Bible believers must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the will of God in his plan for the human race." (Pl. Exh. 457/R.233, A.319.)

[109] (Def.-Int. Exh. E/T. 2100-02) (Pl. Exh. 39/T.2024). A recent poll indicates that 50% of Catholics approve of "abortion on demand". Slip op. at 168. Reliance on polls in this area may be deceptive, however. Much depends on the wording of questions, e.g., whether they call forth views on the substantive morality of abortion or on the role of the state, and on how people are characterized religiously. For example, the polls cited by the district court which indicated no substantial difference between Catholics and Protestants on the question of abortion ignore critically important denominational differences in theological approach, e.g., between mainstream and fundamentalist Protestants within these sweeping categories.

Thus, internal division further demonstrates rather than obscures the religious nature of the abortion controversy. The differing positions are viewed as dictates of conscience, although they appear incomprehensible and even appalling to their adversaries. Belief that requiring a woman to "give birth. . ., without regard to any and all circumstances . . . would reduce her personhood to that of an animal and constitute a gross violation of our Christian faith" [110] and that "abortion may in some instances be the most loving act possible." [111] are conscientious positions as deeply cherished and deeply felt as the belief that abortion is murder. The question is whether the law will protect the conscience of some or the conscience of all.

10. The Legislative History of the Hyde Amendments Demonstrates the Theological Division and the Congressional Purpose To Prefer the Anti-Abortion Belief.

a. The Sequence of Hyde Amendments Reflects an Effort to Enact the Religious Doctrine That Condemns Abortion.

The district court described the irreconcilable division in the legislative process that produced the Hyde Amendment:

> The long sequence of amendments marks the effort to reach a compromise of what could not be the subject of a principled compromise result but could only become a register of the point at which the struggle of principle was arrested. Slip op. at 268.

---

[110] Pl. Exh. 379/R.233. "Abortion and the First Amendment: A United Methodist Position", Policy Statement of the Board of Church and Society, Kansas East Conference of the United Methodist Church.

[111] Pl. Exh. 36/T.2016, A.307, "A Call to Concern."

When first approved by the House, the Hyde Amendment was an absolute prohibition on abortion funding, fully reflecting the underlying religious doctrine that the fetus is human life and abortion impermissible, except when indirect.[112] Annex to slip op. at 8 (hereinafter, Annex). The Senate rejected it overwhelmingly. Annex at 24; Cong. Rec. S10806-07. The Conference Report, which became the FY 77 Rider, provided a life-endangering exception, a formulation of the life-for-life principle, which is doctrinally acceptable to most of the anti-abortion faiths and politically acceptable to "right-to-life" advocates.[113] Annex at 76, 83. The Report explained the intent not to affect indirect abortion and treatment such as D.E.S., for rape and incest victims. *Id.* These treatments are also approved by the anti-abortion faiths. *Supra* at section 9(a)(1).

The struggle over abortion funding escalated in June 1977, when the FY 78 Rider had to be negotiated in light of this Court's decision in *Maher v. Roe*. The Conference Committee deadlocked over House refusal

[112] The doctrinal distinction between direct and indirect abortion was first made when the House cast a second vote insisting on its disagreement with the Senate. Mr. Hyde argued that the Amendment included an exception for life endangerment, because abortions performed in those situations are not deemed abortions. Annex at 30. (H8633-34, August 10, 1976). Examples noted were that it would not prevent removal of an ectopic pregnancy, the treatment of cancer by radiation or hysterectomy notwithstanding the incidental loss of fetal life. Annex at 35. Hyde also argued that it would not prevent D.E.S. treatment for rape victims and the use of the IUD. Annex at 30.

[113] *See* Pl. Exh. 392, 424/R. 233; Lodged, Vol. IV, Nos. 10, 11 (hereinafter indicated L. IV), which explains the political acceptability of a life exception.

to move from life-endangering[114] and Senate insistence upon enlarging the exceptions. Finally, the congressional leadership hammered out the compromise which included, in addition to life-endangerment, very narrow relief for cases of physical health damage, and rape and incest victims. Annex at 284-89.

The annual battles illustrate that the struggle is over principle rather than practical consequences. Despite only a handful of certifications under the physical health, rape and incest exceptions (see § C(3) *supra*), the House sponsors nevertheless continually tried to eliminate all but the life exception. Annex at 292, 294-95. Thus, the Hyde Amendment embodies the doctrine of the anti-abortion faiths with only those exceptions that doctrine permits or that its proponents cannot avoid.

b. The Legislative Debates Illustrate That the Hyde Amendment Was a Product of Religious Belief and Pressures Against Abortion.

The district court found:

> What can be said is that an organized effort of institutional religion to influence the vote on the

[114] Only a life-endangering exception was clearly acceptable to Hyde, the Catholic Church and its lobbying arm, the Committee for a Human Life Amendment (CHLA), and the CHLA lobbyist, who was viewed as having a decisive impact on the principal House conferees. Annex at 91-2; Pl. Exh. 45 Werner, T.2417;Pl. Exh. 305B, 305C/R.233 L. IV-20; Werner, T. 2432; slip op. at 268. After a proposal to fund in cases of grave physical health damage was almost accepted by the House conferees (Pl. Exh. 46/Werner T.2449, Proposal T) L. IV-18, the Committee adjourned. By the next morning the House conferees had returned to their life-for-life stance. (Pl. Exh. 46/Werner, T.2444). The Committee never met again.

> enactments in question on religious grounds was made, that it cannot be said that the efforts did not influence a decisive number of votes through a combination of religious belief and principle on the part of some with a fear of political reprisal on the part of others, and that the narrow votes in both houses are open to the inference that in one or the other way the religious factor was decisive of the issue for enough legislators to affect the outcome of the voting. Slip op. at 271.

In analyzing the legislative history, the district court relied extensively on the framework provided by plaintiffs-appellees' witness, Dr. Gillian Lindt, a sociologist of religion who chairs Columbia University's Department of Religion. Dr. Lindt focused on four indicia of religiosity: the purpose of the legislation; whether its sponsors sought to legitimate it, implicitly or explicitly, by religious references; whether religious belief and denominational support is used to explain positions; and, finally, whether the debate is particularly divisive in character. (Lindt, A.254.)[115] Analysis of the Hyde Amendments under all four criteria reveals the intense religiosity of their purpose. The district court found:

> The language of the debates, the arguments made, revolve around the pro-life assertion that the fetus is a human life from its beginning, and that,

[115] To avoid repetition we draw primarily on the legislative debates on the FY 78 Rider. The district court found the content of the debates did not change from one year to the next. Slip op. at 266. Unless otherwise noted, the citations which follow are to 123 Cong. Rec. (daily ed.); the dates are abbreviated and "remarks by" and titles omitted.

> therefore, abortion is either never permissible, or is permissible only in the narrowest circumstances. Slip op. at 273.

Indeed, every Representative and Senator who spoke in favor of the Riders espoused this view.[116]

The debates reveal that the proponents' view of the fetus as human life is religiously based (Lindt, A.248-49.). The district court observed the "[r]eligious motivation and allegiance to religiously perceived principle on the part of many legislators, on both sides of the issue . . . ." Slip op. at 270.

On the most obvious level, advocates of the Hyde Amendment described the fetus as being in relation to God and as having a soul.[117] Proponents repeatedly

[116] In the House, for example: "Abortion . . . is the calculated killing of . . . [a] human being . . . that is not a potential human life; it is a human life with potential." (H6084)(Hyde). Also in the House, "[T]he Amendment . . . will prevent the use of tax funds . . . to destroy human life." (H6085, 6/17/77) (Bauman).

Mr. Dornon equated abortion with the "killing of innocent life and the execution in mothers' wombs of 14 million American citizens." (H6087, 6/17). Mr. O'Brien said: "Whether the unborn child is rich or poor, it is a human life and deserves a chance to live." (H6090, 6/17). Mr. Edwards describes abortion as "snuffing out the life of an unborn child" (H6090, 6/17); and Mr. Volkmer, as "the death of unborn children." (H6090, 6/17). Mr. Russo equated a funding cutoff with "sav[ing] lives" (H6097, 6/17). Mr. Conte described abortion as "someone else's right to kill human life." (H10134, 9/27).

In the Senate: Senator Helms describes the embryo as a "tiny human being . . . waiting to be born" and as "an innocent human life." (S11036, 11042, 6/29). Mr. Domenici referred repeatedly to "unborn children" and the value of human life. (S11037, 6/29). Mr. Stennis described the fetus as "an innocent, inconvenient human being." (S11039, 6/29).

[117] Mr. Hyde argues against compromise: "[W]e ought not to allocate to ourselves the role of Almighty God" (H10969, 10/13),

characterized the fetus as innocent and abortion as a slaughter of innocents. (*See* Lindt, A.247-48.)[118] The district court observed that:

> The repeated use during the debates of 'human life' terminology extended at times to referring to the immortal soul of the fetus, to invoking Herod's slaughter of the innocent, and to emphasizing that the fetus is 'defenseless,' is 'innocent.' Much of this language is seen in the Roman Catholic literature already referred to, and it implies humanity in the fetus—for only rational beings can be 'innocent' in moral terms. Slip op. at 275.[119]

---

invoking the memorial to the Jews killed in the Holocaust: "He who saves one soul, saves humanity" (H6084, 6/17). Dr. Lindt explained that "in the context of an impassioned plea for saving the lives of fetuses . . . the equation is with the fetuses being saved . . . because they too, have souls" (T.4623-24; *see also* T.4620. Mr. Dornon speaks of the fetuses' destiny as "God willed" (H6087, 6/17), and warns against inclusion even of a life-endangering exception: "God will not be mocked. We cannot continue to kill millions of innocent preborn children each year. Human beings with an immortal soul and their entire genetic code in place." (H12173, 11/3).

[118] Mr. Hyde constantly refers to abortion as "the slaughter of innocent, inconvenient unborn children" (H6083, 6/17) and the calculated killing of innocent, inconvenient human beings (H6094, 6/17, H10969, 10/13, H10834, 10/12, H10830, 10/12). Mr. Bauman (H6085, 6/17) and Mr. Dornon (H12173, 11/3), among the most frequent proponents of the Hyde position, frequently reiterate this theme.

The "slaughter of the innocents" theme permeated the speeches of the key proponents in the Senate as well. Mr. Stennis describes abortion as "the calculated killing" and the "unnecessary slaughter of innocent unborn children" (S11039, 6/29); Mr. Helms, the "deliberate termination of innocent human life" (S11036, 6/29); and Mr. Bartlett reminds his colleagues that "unborn children [are] . . . the most innocent among us." (S13673, 8/4).

[119] *See* Lindt, A.254.

Dr. Lindt testified that the religious nature of the issue was also demonstrated by the intensity of the negative value attributed to abortion.[120]

Notwithstanding frequent invocation by Hyde proponents of the scientific evidence of fetal development, the district court found the issue religious:

> There was no absence, on either side of the debate, of a sufficient knowledge of human physiology; there were no mistaken notions about the physical nature of the fetus. Indeed, it was the pro-life forces which called on the discoveries of modern science to confirm if not establish the validity of their position. Nevertheless, the insistence that fetal life has the inviolability accorded by all to the life of born human beings is not genuinely argued; it is adamantly asserted and forms the basis for much essentially religious language. Slip op. at 273.[121]

---

[120] *See* slip op. at 165. The speeches constantly reiterate this value-laden perception of the abortion procedure. Defendant Hyde refers to the "abortion-chamber" (H10834, 10/12), "Slaughter" (H6083, 6/17), "calculated killing" (H6082, 6/17), "exterminate" (H10835, 10/12), the transformation of the medical profession into "executioners-for-hire" (H10133, 9/27; H10969, 10/13). Mr. Bauman refers to abortion as "murder" (H6095, 6/17; H12172, 11/3), "slaughter" (H10969, 10/13). Mr. Dornon talks of the execution of American citizens (H6087, 6/17). Mr. Bauman characterized abortions as "[T]he final solution to borrow a phrase from not too recent history." (H6095, 6/17).

In the Senate there were references to abortion as a "heinous crime" by Mr. Garn (S11035, 6/29); and as a "moral crime" by Mr. Hatch (S11038, 6/29).

[121] The district court noted as well that "much other argument . . . in the debates was free of religious reference, whether or not the debators were motivated by their religious convictions." Slip op. at 275. Dr. Lindt noted that the debates

The court noted the debators' citations to various church teachings to legitimate their positions,[122] as well as "frequent avowals . . . of religious affiliations . . . [and] upbringing" in the context of "[t]he charge that the pro-life members were seeking to impose their 'morality' or their religious views on . . . poor women and the counter-charge that the pro-choice members were preparing to require taxpayers to whom abortion was morally abhorrent to subsidize it . . . ." Slip op. at 276.[123] (*See* Lindt, T.4279; A.253.)

---

must be read holistically and that seemingly secular assertions in one place are informed by religious references in another. (Lindt A.251.)

[122] Mr. Bauman identifies the leaders of the "right to life movement" as "Catholic, Protestant and Jewish" (H10831, 10/12). Mr. Percy stresses the support of religious organizations for the right to abortion, saying: "Those are organizations every bit as concerned with human life and morality as any church any of us might belong to" (S11032, 6/29).

[123] Mr. Rudd says funding discriminates against those opposed to abortion "on religious conviction or otherwise" (H6088, 6/17). Mr. Milford says: "I believe we are asking too much of those who are so morally opposed to this issue, by taking their tax money to fund the very act that violates their religious convictions" (H6097, 6/17). Mr. Stanton said "certain inalienable rights that come from God and not from man" (H6095, 6/17). Mr. Taylor adverted to raising his adopted daughter in a "Christian home" (H6089, 6/17). In the Senate, Mr. Hatch urges support for the Hyde Amendment because abortion is a "moral crime" and something about which "people feel deeply and religiously" (S11038-39, 7/29). Some voting pro-choice indicated their personal convictions against abortion: Mr. Bayh states that he came to a personal decision that the fetus is life but that "people have a right to differ on this" (S11043, 6/29). The court noted that Roman Catholic legislators who supported anything other than the narrow life-endangerment standard found the debates particularly trying. Slip op. at 268-69. Also, Mr. Kennedy: "I am opposed to abortion on demand. This opposition is based on deep moral and religious beliefs" (S11053, 6/29). Mr. Moynihan: "In my view, decisions about birth and abortion are moral and religious decisions, which must be left to each individual or family to make" (S11056, 6/29).

The district court observed that:

> [t]he pro-choice debators . . . frequently emphasized their respect for the pro-life members' views and, in so doing, manifested an evidently informed belief that the pro-life views were essentially religious.[124]
>
> * * * * *
>
> The pro-choice members argued that the abortion decision was a matter of individual conscience.[125]
>
> And there was a recognition that in the minds of some members their religious beliefs did not really leave them a free vote.[126] Slip op. at 276-77.

---

[124] "If your religious convictions tell you abortion is wrong, honor them." (H6089, 6/17) (Rose). Mr. Weiss describes the Hyde Amendment as "stand[ing] in moral judgment of . . . poor women" (H6093, 6/17).

In the Senate, Mr. Percy describes the anti-abortion pickets as "deeply convinced that they have a direct source to the truth . . . and that God is on their side." (S11033, S11045, 6/29). Mr. McGovern says it "impose[s] one moral viewpoint" (S11040, 6/29).

[125] Mr. Milford, although voting to restrict funds because of religious belief, acknowledged that the decision to abort should be decided by the woman "after counsel with her own conscience." (H6096-6097, 6/17). Mr. Allen urges "compassion" and asks whether the proponents of Hyde realize the "cruelty its literal enforcement would visit upon the poor, the sick" (H6090, H6093, 6/17). "We are not Almighty God and we really cannot decide so lightly issues that lead to the agonies and suffering of other people," concluding, "I ask for mercy . . ."(H12171, 11/3)(Fenwick). Mr. Bayh states: "[Abortion] is perhaps the most deeply felt philosophical, religious and moral issue I have ever confronted" (S18582, 11/3); *See* Lindt, A.256).

[126] Mr. Bauman stated: ". . . how can any of us explain backing down and voting against this important principle of life" (H10831,

The lower court found that the pressures of a religiously mobilized single-issue constituency played a pivotal role in the debate:

> The debates reflect the members' awareness for the magnitude of the right-to-life political effort of the single-issue voting with which many were faced and which, inferentially, favored some members' electoral chances. Slip op. at 165.
>
> The members were plainly aware, were made aware, of the pressures exerted upon them by their sense of their constituencies' views on the issues and of the religious setting in which the views were entertained and expressed. Slip Op. at 277.[127]

Finally, the extraordinarily fierce emotionalism, divisiveness and inability to compromise, reflected in the Hyde debates are other indicators of the religious nature of the issue at hand. The district court found:

10/12); Mr. Mahon quotes the old hymn "Take your troubles to the Lord and leave them there," and states: "I just want my colleagues to vote their own consciences . . . I [would not] twist an arm or say an unkind word or otherwise try to pressure anyone." (H12771, 12/7). "I believe firmly that every man must render an accounting not only for every idle word but also for every idle silence" (H12773, 12/7) (Hyde). During debate on a similar funding restriction, Mr. Conte says, "I feel justified in supporting these provisions as a legitimate compromise, [b]ut . . . in good conscience, I cannot go much further" (H10836, 10/12).

[127] "I cannot possibly cast a vote on the abortion issue without making a large number of people in my district very angry . . . It's a no win situation." (H6096, 6/12) (Milford); The vote is one which "place[s] my head on the election 'chopping block' " (H6097, 6/17) (Meyner). It is "fraught with a great deal of political liability but the heat is not going to get any less . . . "(Bayh, S18583, 11/3).

> The debates were often bitterly controversial, even inflamed. The members returned to the debate again and again with expressed reluctance but with unabated resolution. The members recognized that the debates were often emotion-charged, and much of the argument, even read in the black and white of the Congressional Record, is deeply felt, personal in tone, and consciously moralistic—because the speaker sees no escape from the moral issue or from its importance. Slip op. at 277.[128]

The difficulty of compromise stemmed from the intensity and religiosity of the belief at issue.[129] (Lindt, A.252.) In the end, the resolution was satisfactory to no one but represented "only what could be negotiated across an unbridgeable gulf of principle." Slip op. at 165.

---

[128] "Abortion is the most divisive basic issue I have run across in my experience" (S11030, 6/29) (Packwood). Mr. Mitchell recognizes "the passionate nature of the opposition to abortion" (H6094, 6/17); Mr. Flood: "It is an emotional problem. That is why we are here ranting and raving one way or another . . . " (H6096, 6/17); Mr. O'Brien characterizes it as "fiercely emotional" (H6090, 6/17). Mr. Obey says, "An issue like this tears my guts out." (H12171, 11/3).

[129] "It is pretty hard to compromise between people who believe strongly on one side and people who believe strongly on the other side" (S19439, 12/7) (Magnuson); "[T]here are an awful lot of us who will fight right down to the wire because of those beliefs" (S11039, 6/29) (Hatch). "[T]here is not a political question but . . . a matter of principle . . . that cannot be compromised. It is basically a principle of life" (H12491, 11/29) (Volkmer). Mr. Giaimo, speaking against the riders, "We cannot compromise a fundamental principle." (H10836, 10/12). Mr. Flood counselled against compromise: "I call upon you, who have been so sound and so faithful to your traditions and your beliefs, to again be that way. This is the House, thank God, and vote against this motion" (H12174, 11/3).

11. The Opposition to Abortion Which Produced the Hyde Amendments is Pervasively Religious in Character.

The district court considered extensive evidence on the purposes, character, organization and activities of the anti-abortion drive. This evidence, relevant to the analysis of legislative purpose under both the Fifth and First Amendments, demonstrates that the systematic hierarchical mobilization by the Roman Catholic Church had made it the backbone of the so-called "right-to-life" movement. Beyond that, and more importantly, the evidence demonstrates the religious nature of the popular movement itself. Its themes, symbolism, and advocacy are intrinsically religious; its cause is associated with God and religion; and its constituency comes principally from religious groups which share the faith commitment.

Appellees want to make crystal clear that the educational, pastoral and political activities of religious and other institutions discussed here are fully protected by the First Amendment's guarantees of free expression, petition and free exercise of religion. We do not contend that any of these activities are unconstitutional nor do we seek to restrain them. First Amendment freedoms cannot, however, insulate from scrutiny the religious background of legislation challenged under the Establishment Clause.

a. The Roman Catholic Church Has Spearheaded An Extensive Political Mobilization To Enact Their Religious Doctrine Against Abortion Into Civil Law.

The district court recognized the pivotal role of the church in the mobilization which produced the Hyde Amendments:

> In this period, the record indicates, only the Roman Catholic Church, among the institutional religions, has sought to secure the enactment of legislation that would forbid abortion, has organized educational and lobbying efforts to that end and has acted to mobilize popular support for the legislative goals. Slip op. at 280.

Since 1973, the Roman Catholic hierarchy has worked to overturn *Roe v. Wade*. Slip op. at 200.[130] In 1975 the National Council of Catholic Bishops (NCCB) promulgated the Pastoral Plan for Pro-Life Activities (hereinafter, Plan), a complete blueprint for political as well as pastoral mobilization "to bring civil law into consonance with Catholic teaching." Slip op. at 208.[131]

The Plan is unprecedented in the life of the Catholic Church in the United States (Smith, T.2142-45). Its objective is to amend the Constitution and stop public funding of abortions because a "just system of law cannot be in conflict with the law of God." (Pl. Exh. 39, p. 7). It calls for activation of official and lay structures and for the establishment of a nationwide network of parish, diocesan, and state pro-life committees to promote educational and political activity under the coordination of the NCCB's Pro-Life Activities

---

[130] Abortion Hearings I, pp. 153-253.

[131] Smith, T.2140-41; Pl. Exh. 39/T.2019: L.IV-9. The district court details the elements of the Plan. Slip op. at 201-16. It found that the Plan and "The Declaration on Abortion . . . of course embody explicitly religious teaching: the Declaration 'entails a grave obligation for Christian consciences;' the Pastoral Plan speaks of 'the grave sin of abortion' as does the Declaration." Slip op. at 228.

Committee. Slip op. at 205-6.[132] Its 12-point political program is largely directed to "convinc[ing] all elected officials and potential candidates that 'the abortion issue' will not go away and that their position on it will be subject to continuing scrutiny." Pl. Exh. 39, p.12: L.IV-9. The district court found:

> There is no question that, to a very considerable extent, Roman Catholic clergymen have encouraged their parishioners to participate actively in the political effort to have a right to life amendment passed and to support the Hyde Amendment.[133]
>
> A great deal of documentary evidence is in the record showing numerous parish and diocesan publications, and some national publications, urging political action, giving information on voting records on the abortion issue of state and federal legislators, emphasizing the special importance of the abortion issue because of its connection with life values, intimating and, occasionally, advocat-

[132] In addition, the Plan declares it "absolutely necessary" to develop in each Congressional district a "tightly knit and well-organized pro-life unit [which] can be described as a public interest group or citizens lobby," and which, though not a "church agency", is to maintain close contact with the Diocesan Coordinating Committee and which "will need some financial support." Slip op. at 205-08 (Pl. Exh. 319, at 11-13.)

[133] Appellees did not try to document implementation of the Plan nationwide and the district court quite properly found it ". . . far from clear . . . [h]ow systematically the Pastoral Plan was carried out." Slip op. at 210. The Court did note evidence of implementation in some parts of the country, and "The Clergy Bulletin of the Diocese of Fargo, North Dakota, reflects in the Bishops' instructions to the Clergy, a fairly complete implementation of the program." Slip op. at 209.

> ing single issue voting, and perhaps less frequently, cautioning against voting on a single issue where many issues are involved. Slip op. at 209-10.[134]
>
> Roman Catholic clergy and laity are not alone in the pro-life movement, . . . but the evidence requires the conclusion that it is they who have vitalized the movement, given it organization and direction, and used ecclesiastical channels of communication in its support. *Id.* at 231.
>
> That the efforts of the Roman Catholic clergy and laity have produced the Hyde-Conte Amendment of 1976 and its successors cannot be found as a fact, but it is more likely than not that those efforts have been a factor that cannot be eliminated from the chain of causation. In any event, the pro-life effort, of which the organized Roman Catholic effort has been the most active component, has made use of the political process, and played a significant part in bringing about Congressional legislation on the subject. Slip op. at 281.

[134] Several exhibits from the Catholic press show frequent attention to the abortion issue on the national, diocesan, and parish levels. For example, *Our Sunday Visitor* is an official national weekly magazine. In 1977, it carried over 100 items dealing with the abortion issue; 87 were news articles or signed commentaries and 15 were editorials (Pl. Exh. 451/R. 233). The *Pilot*, published by the Archdiocese of Boston, had 47 items on abortion in 11 issues, eight on the front page. Fifteen articles attacked Governor Dukakis' veto of the state Medicaid cut-off. (Pl. Exh. 452/R.233). *See also* Pl. Exh. 335 A and B, 338, 340 A-C, 341 A, D and E, 351 A, F-K, and Pl. Exh. 450/R.233: L. IV-30, 31, 34, 35, 36, 37, 38, 39).

Parish bulletins also mobilized the constituency. Bulletins from different parts of the country—including Maryland, Pennsylvania,

b. The Record Demonstrates The Religious Themes and The Absence of a Secular Interest or Constituency in the So-Called Secular "Right-to-Life" Movement.

The fact that the Roman Church and others play a central role in the "right-to-life" movement is not alone decisive of its religiosity. It is more significant that the supposedly secular "right-to-life" groups are in fact sectarian and have no distinct secular component. The record demonstrates the religious nature of the "right-to-life" effort in two major respects: (1) the themes, symbols and advocacy of these groups are religious and (2) the constituency is drawn primarily from identifiably religious communities.

The district court found:

> The right-to-life movement, although not confined to Roman Catholics and Roman Catholic clergymen, does use religious language, invokes religious motivations, and enlists prayer as an aid. Slip op. at 228.

As in the congressional debates, the themes that predominate in "right-to-life" literature echo and elaborate upon the central teaching of the anti-abortion faiths that the fetus is a person:

> The literature of those opposing abortion speaks of embryos and fetuses as human beings, children,

Illinois, Wisconsin, Missouri and Minnesota—were submitted and the district court found that "at times [they] included some material on the abortion issue and not infrequently included a good deal of that material . . ." Slip op. at 211. Pl. Exh. 60/T.2735:L.IV-30, Pl. Exh. 78/T.2897:L.IV-31, Pl. Exh. 307A & B/R.233:L.IV-34, Pl. Exh. 309A/R.233:L.IV-35, Pl. Exh. 343A.-C.:L.IV-36, Pl. Exh. 369A,B./R.233:L.IV-37,38, Pl. Exh. 371/R.233:L-39.

> unborn children, the innocent unborn, and it personifies them. Abortion is characterized as murder. Slip op. at 229.

The literature refers to the fetus, explicitly or implicitly, as having a soul, pleading to be saved.[135] The religious theme is also implicit in constant references to the "innocence of the unborn" and Herod's slaughter of the Innocents. Slip op. at 229-30.[136] The district court found that the anti-abortion movement is pervaded by religious symbolism[137] and "kept alive . . . by

[135] The New York State Right to Life Committee (NYSRTLC) calls its raffle "Save a Baby" (Pl. Exh. 429, 431/R.233) and refers to the fetus as "our little ones" (*Id.*). Henry Hyde describes "the soul of the unborn child" as a "little bit of infinity" (Pl. Exh. 462/R.233; A.312); The Human Life Amendment Group's flier "Abortion is Murder" cites the Old and New Testament to prove this point (Pl. Exh. 347/R.233; A.309). NYSRTLC newsletters speak of "our 'little ones' who can now only speak to their Creator" (Pl. Exh. 431, p. 2/R.233) and "the denied ones" (Pl. Exh. 432/R. 233 L. IV-27); a retired Bishop, chaplain of the Knights of Columbus, speaks of the "tiny, unsilenced, haunting voice of the murdered unborn child." Slip op. at 229, Pl. Exh. 348/R.233: L.IV-26.

[136] *See also* Pl. Exhs. 424, p. 4, 429, 431, p. 2, 348, p. 2-3/R.233. Taxpayers urging opposing Medicaid funding refer to "Precious Holy Innocents of today's world." (Pl. Exh. 368/R.233.) Illinois Citizens Concerned For Life refers to the "innocent lives of the unborn children," stating "the slaughter of unborn must be stopped." (Pl. Exh. 345B) *See also* Pl. Exhs. 345A; 363, p. 2: L.IV-24; 368; 469E.

[137] Pictures of the 1978 "March for Life" show rosaries in the hands of various marchers and draped over the "Stop Abortion" banner. Other marchers carry signs, "Pray the Rosary," "The Lord Giveth and the Lord Taketh Away," and "Jeremiah 1:5, Before I Formed You In The Womb I Knew You." (Pl. Exh. 456A/R.233, A.328; *see also,* Pl. Exh. 424/R.233.)

Some Knights of Columbus banners and a statue of the Virgin Mary are prominently carried, and the March for Life leaflet refers to the red roses, widely used by the anti-abortion move-

the practice of having prayers said and services conducted in direct relation to the pro-life activity."[138]

The anti-abortion effort describes itself as a crusade carrying forth God's work, on a mission against the devil.[139] The 1978 "March for Life" leaflet declares "[W]e continue to wage the necessary, just and peaceful war against the evil of abortion and all other evils which have come in its wake . . . [P]ro-lifers continue the battles so that good can triumph over evil." [140]

Henry Hyde's comments before the supposedly secular Maryland State Right to Life Convention banquet highlight the pervasive religious identification and fervor of the anti-abortion movement.

---

ment, as "symbols of short life and martyrdom." (Pl. Exh. 308/R.233, A.326).

[138] Slip op. at 228-31 (Pl. Exhs. 305A; 305B, L. IV-19; 454; 340 B,C; 420/R.233, A.321; 308/R.233; 68/T.2554; Pl. Ex. 438/R.233).

[139] A large, red, white and blue billboard in St. Louis proclaims, "God is Pro Life," (Pl. Exh. 312A/R.233, A.311.) A banner at the 1978 March for Life reads, "Lutherans for God, Country and Human Life Amendment" (Pl. Exh. 456B/R.233, A.327.) The NYSRTCL newsletters and mailings refer to God's blessings, the "work [to] which we have all been called," activists as "indispensable to a movement that is truly God-inspired," and the annual RTL convention as "[j]oy in doing God's work for the denied ones . . . ." (Pl. Exhs. 429/R.233, A.322; 435/R.233; 432/R.233; 453/R.233, A.329; 400/R.233; Pl. Exh. 420/R.233, A.321.)

[140] Pl. Exh. 308/R.233, A.326, Slip op. at 229. Those who support the "sin" of abortion are sternly warned "God can send devastating storms, floods, epidemics, pestilences" (Pl. Exh. 348 at 4/R.233); and that "on judgment day, you will be held accountable." (Pl. Exh. 368/R.233, A.315.) An early effort to generate parish activism argued that "Catholics and Protestants . . . [should] reset this nation upon the theocentric foundation laid down by the Protestant Founding Fathers" (Pl. Exh. 363/R.233: L. IV-24).

> When . . . the final judgment [comes], you are there alone standing before God and a terror will rip your soul like nothing you can imagine. I really think that those in the pro-life movement will not be alone. I think there'll be a chorus of voices that have never been heard in this world but are heard very beautifully and very loudly in the next world and I think they will plead for everyone who has been in this movement and they will say to God, "Spare him, because he loved us." And God will look at us and say not, "Did you succeed?" but "Did you try?" (Pl. Exh. 462, p. 10/R.233, A.313).

The record reveals that basic religious themes pervade all anti-abortion literature.[141] The record does not, on the other hand, indicate any secular constituency mobilized against abortion.

The district court found that the "right-to-life" movement is not exclusively Roman Catholic: the "union of effort with . . . other denominations is based on shared religious conviction." Slip op. at 232. Indeed, appeals for support beyond the Catholic community generally emphasize the desirability of activating other religious groups.[142] Clear secular concerns such as ma-

---

[141] The content of the appeal differs depending on the religious community to which it is addressed. Thus, where the constituency is primarily Catholic, the approach tends to be more philosophical. Where the constituency is fundamentalist, reliance on scripture is common. For example, the Greenville, Mississippi Right-to-Life newsletter opens with an editorial entitled "Why Bible-Believers Oppose Abortion" which lists 10 biblical verses and concludes "the true Bible-believer must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the word of God in His plan for the human race." (Pl. Exh. 457, R.233, A.319).

[142] In the midst of the debate over the FY 78 Hyde Amendment, the Committee for a Human Life Amendment alerted its network

ternal health or even life are uniformly disregarded except insofar as politically expedient. As in the Congressional debates, biological information is frequently cited in the popular literature, but is consistently entangled with religious references. Slip op. at 228. The record demonstrates overwhelmingly that the "right-to-life" conviction that the fetus is a human life from the moment of conception is religiously derived and religiously legitimized and that the movement, in all its aspects, is religious.

12. The Fabric of Our Society is Increasingly Threatened by the Religious Mobilization Against Abortion.

To the framers of the First Amendment, religious struggles for state power—whether to advance wealth or to enforce faith—were among the greatest dangers to basic liberty and the survival of a robust but tolerant pluralistic society. The record reveals that the religious mobilization to eliminate the religious and conscientious liberty protected by *Roe v. Wade* is producing the very sectarian strife and political fragmentation against which the First Amendment was designed to stand guard.

With respect to the religious division over abortion, the district court found:

> What ultimately emerges from the facts . . . is that the major religions whose views were presented all regard abortion as presenting religiously framed questions of moral right, moral duty and

to seek support in terms of signatures, clergy visits, and prayer vigils from "pro-life" ministers, priests, and rabbis (Pl. Exh. 305A,B /R.233; L.IV-19). *See also* Pl. Exh. 364/R.233: L.IV-14; Pl. Exh. 28/R.233: L.IV-28.

> conscience, that they are in disagreement on the appropriate rules of conduct but in agreement that abortion is a morally grave undertaking in any circumstances, and that their sharpest disagreement concerns the role of civil government. Slip op. at 280.

The record shows that the mobilization against abortion rights has invoked deep concern for the future of ecumenism. On both sides of the controversy, abortion is seen as the "chief issue," an "albatross" for Christians.[143] (Pl. Exh. 351G/R.233), and the "one issue of greatest division today." (Wogaman, T.1997).

The anti-abortion mobilization is widely seen as an effort to impose one segment of religious morality. Despite the normal reluctance to risk ecumenical accord, many denominations[144] and prominent theolo-

[143] The sectarian discord generated by the effort to enact the Hyde Amendments was calmed by the original injunction in this case:

> [W]hen the Hyde Amendment was first . . . proposed and adopted [t]here was a gathering storm of . . . controversy . . . a conflict among religious groups . . . which was noted in the newspapers at the time as a danger, a risk. [T]hen when . . . this Court enjoined the . . . Hyde Amendment, that put the conflict aside . . . for a period of time . . . . It was more generally understood that the dialogue would go on about the religious question . . . among scholars and people in the religious sphere and the public sphere. (Wogaman, T.2001-02).

[144] The Religious Coalition for Abortion Rights (RCAR), comprised of 27 national religious organizations, was formed to oppose the activities of "a vocal minority [that] would . . . nullify the Supreme Court decisions . . . [and impose] [o]ne theological view . . . on Americans of all faiths." Slip op. at 232-33 (Pl. Exh. 320/R.233: L.IV-2). In 1974, the American Baptist Churches decried "the present national effort of the National Conference of Catholic Bishops in the U.S.A. to coerce the conscience and per-

gians[145] have publicly decried this effort. The Church mobilization has also drawn strong criticism from within the Church for imposing a particular moral view, threatening pluralism, substituting coercion for persuasion, and generating single-issue politics. Slip op. at 216-23 (Pl. Exh. 300, 486b).[146]

Communication is not always so restrained, as disputation gives way to invective. The same accusations that pervade the legislative debates are polarizing the religious community.[147]

---

sonal freedom of our citizens through the power of public law in matters of human reproduction." (Pl. Exh. 133/Wood, T.3194; *see also* Pl. Exh. 135/Wood, T.3196).

[145] When the FY 78 rider was being debated in Congress, over 200 Protestant, Jewish and Catholic ethicists signed a Call to Concern protesting "the heavy involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into laws." Slip op. at 234-35 (Pl. Exh. 36/T.2016, A.307: L. IV-1.) Acknowledging the right of all to seek laws consonant with their own religious beliefs, the Call nonetheless considered the Catholic Church's institutional activities inappropriate on this issue because curtailment of abortion rights "would violate . . . deeply held religious convictions." (*Id.* A. at 308.)

[146] The Lutheran Church-Missouri Synod recognizes that laws which reflect the "religious credo" of a minority have no title to public authority. Slip op. at 178.

[147] *E.g.*, a Roman Catholic Archbishop calls pro-choice supporters necrophilic and equates abortion with the Nazi Holocaust (Pl. Exh. 319/R.233: L.IV-41); the *Wanderer*, a Catholic weekly, comments that abortion is worse. Outraged rabbis, joined by other religious leaders, score these affronts to their morality and to the memory of six million Jews as "demagoguery" and "obscene." Slip op. at 233-34. (Pl. Exh. 490.) Rev. Wood compared abortion with the "open debate" on parochial school funding: "When we talk about political divisiveness on the part of religion . . . we haven't seen yet in the history of this country, what we would have if, indeed, the Right to Life Movement is able to enact its position into law through abridging the First Amendment . . . It will be

A movement which assumes God-given authority to stop abortion "murders" inspires not merely violent epithets but violent acts against abortion clinics as well. Slip op. at 235-36.[148] Although the individuals responsible for these attacks have not been identified, "the issue is one which lends itself to extremes of expression and to easy incitement to anger and violence." Slip op. at 237-38.[149]

The district court found that the anti-abortion mobilization is creating political divisiveness along religious lines. The court said:

> The abortion issue has become an important part of the electoral and legislative processes since 1973. The evidence does not, of its nature cannot, demonstrate that the abortion issue has begun to dominate politics. Equally it cannot be said that the abortion issue has not decided any elections. Practical reason gives assurance that it must have done so, that the forces to produce that result

---

divisive in a way we have never imagined in the past." (T.3225-26.)

[148] On Ash Wednesday, 1977, the Planned Parenthood Clinic in St. Paul, Minnesota, suffered extensive damage from arson. Slip op. at 235. Attempted firebombing and vandalism has been reported in Omaha, Cleveland, Columbus, Cincinnati, Akron and Burlington, Vermont. Slip op. at 236. (Pl. Exhs. 395, 396, 402, 404.)

[149] Plaintiffs ask this Court to take judicial notice of the fact that, subsequent to the trial in this case, on the afternoon of February 15, 1979, when scores of people were in the Bill Baird Center, an abortion clinic in Hempstead, New York, the Center was destroyed by fire. New York *Times*, February 16, 1979, at B1:6. The arsonist, who stated his opposition to legal abortion, was later acquitted by reason of insanity. New York *Times*, October 31, 1979, at B2:5.

have been often deployed, and that they could not have failed uniformly. Slip op. at 264-65.

* * * * *

[T]he issue is seen as alive with considerations of specifically religious morality . . . . Slip op. at 265.

* * * * *

[S]ingle-issue voting [is] almost inevitably encouraged by the bitterly controversial abortion issue. . . . Slip op. at 266.

The tendency of religious issues to assume single-issue importance to the exclusion of other issues in the political arena is more apparent with regard to the abortion issue than with any other in our time.[150]

Minnesota, where the mobilization began even before *Roe v. Wade*, illustrates the direction and impact of the Church and right-to-life efforts on the political process. Slip op. at 247-64. As a result, abortion had become by 1976 the overarching and, in many cases, the sole issue upon which the political process within the Democratic party divided.[151] The political situation

[150] The Pastoral Plan is understood by many to encourage single-issue voting and it has had that effect despite disclaimers of absolute singlemindedness from the hierarchy. Slip op. at 210, 217-23.

[151] Parishioners were mobilized to vote "pro-life" through the scheduling of special masses on the day of the electoral caucuses. The statewide diocesan paper, the *Catholic Bulletin*, repeatedly stressed the singular importance of the abortion issue, published polls of the candidates' abortion positions, carried pre-election advertisements which in some cases emphasized candidates' anti-abortion stance; churchgoers were leafleted with fliers stressing the "Catholic" and "Christian" duty to vote pro-life, regardless of

in Minnesota today is "much worse," and has "overtones of a holy war" which were not present even in the divisive conflict over the Vietnam war where religiosity was not involved. Slip op. at 246 (Peek, A.235.)

Single-issue divisiveness is perhaps best illustrated by the annual debates over the Labor-HEW riders themselves, where abortion is often the only matter requiring a Conference Committee and ultimately the most difficult question to resolve.[152] The annual struggle over Labor-HEW appropriations is replicated whenever a bill comes up which remotely affects abortion.[153] In the equally heated debates over abortion coverage in the Pregnancy Discrimination Act, Representative Clay underscored the dangerous religious nature of the anti-abortion pressure on the Congress:

party affiliation; and the Church provided intensive organizational and financial support to Minnesota Citizens Concerned for Life. The Peek campaign in 1972, detailed in the district court's opinion, illustrates the chilling effect of church intervention on Catholic supporters and the vilification that the abortion issue inspires. Slip op. at 242-47 (Peek, A.233.)

[152] The tendency of the abortion issue to assume single issue importance is also illustrated by the fact that in 1976, during the Presidential campaign and the debates on the FY 77 rider, NCCB representatives visited Governor Carter and President Ford. They confined their public remarks to the candidates' positions on a constitutional amendment. Despite the NCCB's later statement of nonpartisanship, "the effect of which is necessarily a matter of conjecture," slip op. at 242, the press "saw both candidates as trimming their sails to meet the seeming NCCB wind." *Id*. The candidates were reported as opposing federal funding for abortion and the Hyde debates themselves reflected keen awareness of the pressures created. Annex at 67, 69. Although one can never prove a causal connection, it is notable that the Amendment succeeded in 1976 where it had failed the prior year.

[153] Funding riders generally tracking the Hyde provisions have been tacked on to virtually every appropriations bill which con-

> This amendment is history repeating itself. It is a concept of the Holy Wars all over again, the heathen must be conquered and converted. This amendment says in effect that we must impose our code of morality, indeed our religious views, on those who would exercise their right to freedom of religion . . . . It has indeed become the albatross for all legislation, regardless of the merit of the legislation being proposed. (Pl. Exh. 302 at 25-6.)

Under our Constitution, no court has power to take religion, and the divisiveness it entrains, out of politics—nor should it. It has the power, and indeed the duty, however, to invalidate religious legislation which destroys freedom of conscience and renders scapegoats those most vulnerable, so long as efforts to amend the Constitution have failed.

---

tains funds for abortion. Because of its report supporting *Roe v. Wade*, a rider precludes the Civil Rights Commission from even "apraising . . . studying and collecting information about laws and policies . . . with respect to abortion." (Pl. Exh. 296a/R.233.) Slip op. at 38-41.

SUMMARY OF THE ARGUMENT

I

The district court held that the Social Security Act requires that states provide all medically necessary services, including medically necessary abortions. That holding is undisputed by the Defendants. See Brief of Appellants in *Williams v. Zbaraz*, pp. 43-4, n.23. The district court further held that the Hyde Amendments modify the mandate of the underlying statute. Plaintiffs-Appellees ask that the holding of the district court on the effect of the Hyde Amendment be reversed and rely upon the Brief submitted by Appellants in *Williams v. Zbaraz*.

II

The affirmative exclusion of payment for medically necessary abortions from a program that otherwise prohibits exclusion of medically necessary services on the basis of diagnosis raises constitutional issues very different from those decided in *Maher v. Roe*, 432 U.S. 464 (1977). The Hyde restrictions burden interests of women and physicians that were not present or asserted in *Maher*. The Hyde restrictions burden the ability of the woman and her physician to act to protect her life and health, while the policy approved in *Maher* respected those interests by providing funding where there was a medical need for abortion. This Court's decisions affirm the central importance of the individual's interest in the protection of life and health, both in the abortion context and generally. *Roe v. Wade*, 410 U.S. 113 (1973); *Colautti v. Franklin*,

439 U.S. 379 (1979); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Hyde restrictions also burden interests of religious and conscientious freedom not presented or considered in *Maher*. The degree of the burden imposed upon women and their physicians is much greater than that involved in *Maher*, where only elective, nontherapeutic services were denied. The trial court found that the effect of the Hyde restriction has been to deny funding to women whose pregnancies pose a threat to health and to life. Exclusion of funding for medically necessary services makes it impossible for physicians to practice medicine in accordance with minimal professional standards. Congress has not simply refused to extend a benefit, but rather has taken affirmative action to destroy the statutory entitlement and impose a burden upon one, sex-specific group of people otherwise entitled to medically necessary services under Medicaid. *Nashville Gas v. Satty*, 434 U.S. 136 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1973); *Bellotti v. Baird*, 428 U.S. 132, 147, 149-50 (1976); *Zablocki v. Redhail*, 437 U.S. 374 (1978). In *Maher* the Court found that the policy denying payment for elective abortions furthered a legitimate state interest in "encouraging normal childbirth." 432 U.S. 374. The trial court found that where medically necessary abortions are denied, normal childbirth is impossible. No other legitimate interests are advanced in support of the exclusionary classification.

The district court here found that the actual purpose of the Hyde legislation was to prevent abortions, to protect fetal life. The denial of payment precisely for the purpose of burdening and denying the freedom of women and physicians to choose medically necessary

abortions is unconstitutional. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1972); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1978).

III

The Hyde exclusion creates a classification distinguishing women with health threatening pregnancies from all other Medicaid eligible people in need of medical services. The district court found that the classification violates the equal protection component of the Fifth Amendment. All the factors that distinguish this case from *Maher* dictate that this classification be subject to more than a minimal level of scrutiny. Even under the most deferential standard of review, the classification is unconstitutional because it is not reasonably related to any legitimate government interest.

IV

The district court decision should be affirmed on the ground that the due process guarantee of fundamental fairness protects individuals from arbitrary governmental action demanding the sacrifice of life, health and privacy. *Zablocki v. Redhail*; *Carey v. Population Services International*, 431 U.S. 678 (1977).

V

The district court found that the Hyde Amendment is so "uncertain of meaning" that physicians "cannot divine what medical standard it implies." Slip op. at

322-23. The trial court held that the vagueness of the standard further confirms the Hyde Amendment's failure to meet minimal due process standards. We ask this Court to affirm this holding.

Statutes regulating abortion must give physicians the latitude necessary to make medical judgments. *United States v. Vuitch*, 402 U.S. 62 (1971); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979). The Hyde standard chills the exercise of medical judgment because doctors are unable to understand or apply it, and because they have been threatened with investigation and prosecution for failing to apply it correctly. The result has been that Medicaid has been denied even to that very limited group of women with life-threatening conditions for which entitlement theoretically exists.

VI

The district court held that the Hyde exclusion impermissably burdens the liberty of conscience and conscientious action of women whose religious convictions counsel consideration of abortion, and therefore violates the First Amendment Free Exercise Clause and the Fifth Amendment. This judgment should be affirmed. The evidence shows that the abortion decision is a matter of paramount concern in all major religions. The free exercise guarantee of the First Amendment protects the individual's right to act in accordance with religious or conscientious belief. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *United States v. Seeger*, 380 U.S. 163 (1965).

Withdrawal of Medicaid entitlement for medically necessary abortions substantially interferes with a poor woman's religious decision whether to bear a child. Religious liberty may not be infringed by the denial of benefits or privileges. Public benefits may not be offered on conditions that inhibit or deter the exercise of First Amendment rights. *Sherbert v. Verner*; *Elrod v. Burns*, 427 U.S. 347 (1976).

VII

The district court found that the Hyde restriction does not violate the First Amendment's prohibition against establishment of religion. This holding should be reversed. The legislative history shows that the restriction represents the enactment, into civil law, of a religious belief that the fetus is a human being from the moment of conception. *Epperson v. Arkansas*, 393 U.S. 97 (1969). While all religions regard the abortion decision as a matter of fundamental religious concern, beliefs about the nature of the fetus and the abortion decision are sharply divided.

The Hyde Amendment has a primary effect of advancing one religious belief and placing the "power, prestige and financial support" of the government behind the view that the fetus is a human being. *Engel v. Vitale*, 370 U.S. 428, 431 (1962); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). It serves no secular purpose. Struggle over the Hyde restriction has produced a destructive entanglement of government and religion. *Engel v. Vitale*; *Lemon v. Kurtzman*, 301 U.S. 602 (1971).

ARGUMENT

I.

TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES STATES TO FUND MEDICALLY NECESSARY PHYSICIAN AND HOSPITAL SERVICES, INCLUDING ABORTION SERVICES, AND PROHIBITS EXCLUSIONS BASED ON DIAGNOSIS.

The United States recognizes that, apart from the Hyde Rider, the Social Security Act requires states to fund all medically necessary physician and hospital services, and prohibits exclusions based on diagnosis. *Brief for the United States, Williams v. Zbaraz,* Nos. 79-4, 79-5 and 79-491, p. 43 n. 23. The Act specifically prohibits governmental interference with physician discretion in determining medical necessity and prescribes the exclusive, professionally controlled, mechanisms for professional review of the necessity of medical services. The requirements of the Act are canvassed in the Brief of the Appellees. *Williams v. Zbaraz, supra* at 71-129. *See: McRae v. Harris,* slip op. at 16-20, 294-96. Nine federal district courts, four circuit courts, and two state supreme courts haved found that the Social Security Act mandates funding for medically necessary services and prohibits exclusions based on diagnosis.[154] The Hyde Amendment does not relieve states of their duty under the Social Security Act to cover all medically necessary abortions. See Brief of Appellees, *Williams v. Zbaraz, supra* at 130.

---

[154] *Supra*, note 23 and *D.R. v. Mitchell*, 78-1675 (10th Cir., March 10, 1980).

II.

THE HYDE RIDERS' AFFIRMATIVE EXCLUSION OF MEDICALLY NECESSARY ABORTIONS FROM A PROGRAM PROVIDING OTHERWISE COMPREHENSIVE ENTITLEMENT TO MEDICALLY NECESSARY SERVICES RAISES CONSTITUTIONAL ISSUES CRITICALLY DIFFERENT FROM THOSE RESOLVED IN MAHER V. ROE.

The Court below found that:

> The Medicaid legislation expresses the concern of the nation and state with health, and with providing health care for the . . . needy. *Roe* v. *Wade* and *Doe* v. *Bolton* defined the pregnant woman's fundamental right of decision largely in terms of the medically warranted abortion as a protected alternative to childbirth . . . . On the other hand, *Beal*, *Maher*, and *Poelker* read as cases in which there was no health care need for an abortion. . . .
>
> The concern of Medicaid is with the problem pregnancy that, as such, requires medical treatment. . . . To overrule the medical judgment, central as medical judgment is to the entire Medicaid system, and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is an unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary. Slip op. at 310-12.

The Hyde restriction is fundamentally different from the policy approved in *Maher v. Roe*, 432 U.S. 464 (1977). There the state respected the interest of the woman and her physician in protecting her health; here that interest is ignored. There the policy affected women who sought only elective abortions; here the impact of the restriction falls on pregnant women whose health makes abortion medically necessary. There the state sought to serve a legitimate interest of "encouraging normal childbirth," 432 U.S. 474; here normal childbirth is impossible and no other legitimate interest is advanced. Indeed, the evidence clearly demonstrates that the actual purpose of the Hyde restriction is to prevent the exercise of constitutional rights.

While both cases involved Medicaid funding for abortions, the funding schemes differ in both form and effect. The Connecticut policy challenged in *Maher* provided Medicaid payments for all abortions certified by a physician as medically necessary,[155] and the *Maher* plaintiffs therefore sought to have abortions treated more favorably than other services provided under Medicaid. Plaintiffs here ask only that abortions be treated the same as all other medical procedures under

[155] In its argument to the Supreme Court, Connecticut said:

> [Medicaid] is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. . . . A state regulation which attempted to *exclude* from coverage under Medicaid an abortion wich *was* medically necessary for the patient's health might well run afoul of the equal protection clause as invidious discrimination. That is not the case here. Connnecticut makes no invidious discrimination against abortion under its Medicaid program. *Maher v. Roe*, *Brief of the Appellant*, p. 12 (emphasis in original).

a Social Security Act which requires that Medicaid programs pay for all medically necessary services. In other words, the *Maher* policy was passive; it simply did not extend the scope of Medicaid to include payment for elective services, not required by federal law to be included within Medicaid. *See: Beal v. Doe*, 432 U.S. 438, n. 3. By contrast, in enacting the Hyde Amendments, Congress affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled. Congress, in the Hyde Amendment, singles out abortions and denies women with high risk pregnancies medically necessary services provided to all other poor people in comparable need.

The Hyde prohibition thus does not merely fail to extend a benefit not otherwise available, but it imposes a substantial burden that no other group need suffer. *C.f. Nashville Gas v. Satty*, 434 U.S. 136 (1977). Moreover, in affirmatively reaching out to destroy entitlement to essential medical services, the Hyde restrictions deliberately sacrifice the most basic life and liberty interests of vulnerable citizens. Hence the unconstitutionality of the Hyde exclusions does not rest on an abstract notion of a right to funded abortions, but rather on the fact that funding for medically necessary abortions, like that for all other medically necessary procedures is otherwise guaranteed by the statutory scheme and its exclusion serves no legitimate purpose.

As the Court of Appeals for the Eighth Circuit recently noted, *Maher* "laid down no *per se* rule," legitimizing restrictions on abortion funding however impermissible the purpose or devastating the impact of those restrictions. *Reproductive Health Services v.*

Freeman, No. 79-1275, slip op. at 19-20 (8th Cir. 1980). Rather, "the ultimate test of whether constitutionally protected interests are being impinged upon is not simply the form that the state interference takes but the effect." *Id*. The Hyde restriction differs from the policy approved in *Maher* in terms of the nature of the rights affected, the harshness of the burden created, the classification drawn, and the government interests asserted. These differences, discussed in this section, amply support the conclusions of Sections III and IV *infra*, that the Hyde restriction violates the due process and equal protection guarantees of the Fifth Amendment.

A. The Hyde Restrictions Impinge Upon Important Interests of Patients and Physicians.

The Hyde restrictions burden three interests of women and physicians which were not asserted in *Maher*, and which this Court has recognized as constitutionally significant: first, the interest in protecting life and health in the abortion context; second, a more general individual interest in protection of life and health; and third, the individual freedom of conscience and religious choice. The policy upheld in *Maher*, which provided for all medically necessary services, respected the interest of a woman and her physician in protecting her life and health. The exclusion created by the Hyde Amendments emphatically does not.

In *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), this Court recognized an overriding interest in the health of pregnant women, from which *Maher* did not retreat. 432 U.S. at 475. *Wade* also recognized a state interest in the potential life of the fetus. However, even after

viability is reached, when the state's interest in the protection of potential life becomes compelling, the pregnant woman's health is still of overriding importance. As the Court said in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, if an abortion is "necessary, in appropriate medical judgment, for the preservation of the life *or health* of the woman, even after viability, a state may not prohibit it." (emphasis added) *See: Colautti v. Franklin*, 439 U.S. 379 (1979).

The woman's health and the physician's role in protecting it are a central theme of this Court's abortion decisions since *Wade*. *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Wade*, repeatedly emphasized "the patient's [medical] needs and . . . the physician's right to practice." 410 U.S. at 199 and *passim*. The *Bolton* Court also stressed that "the medical judgment may be exercised in the light of all factors— physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. This leeway, said the Court, "allows the attending physician the room he needs to make his best medical judgment . . . room that operates for the benefit . . . of the pregnant woman." *Id*.

This Court has continued to emphasize the importance of the woman's health in the abortion context. *Connecticut v. Menillo*, 432 U.S. 9 (1975), held that in order to protect women's health, states could constitutionally criminalize abortions performed by nonphysicians at any time during pregnancy. *Id*. at 11. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) and *Bellotti v. Baird*, 99 S. Ct. 3035 (1979), confirm the supremacy of the health and choice interests of the woman

and physician over concededly legitimate concerns of the state in encouraging husbands and parents to participate in abortion decisions. *Colautti v. Franklin*, reaffirms that "the abortion decision in all its aspects is inherently and primarily, a medical decision," 439 U.S. 379, 387, holding that Pennsylvania's protection of the potentially viable fetus unduly burdened the interest in protecting the woman's life and health.

Danforth, *Colautti* and *Bellotti* all involve legitimate state interests.[156] But this Court has held that even these interests may not be furthered in ways which unduly burden the freedom of the woman and her physician to protect her health. Here, by contrast, no legitimate interests are furthered by the Hyde Amendments' denial of payment for medically necessary abortions. *Infra* pp. 128 *et seq.* If the government may not serve legitimate interests in ways that unduly burden and demand sacrifice of women's life and health, *a fortiori* the state may not impose such burdens and demand such sacrifice when no legitimate public purpose is served.

Every member of this Court, even those who would not agree that a woman has a fundamental right to abortion, has recognized that basic due process princi-

[156] Indeed the interests which the state sought to promote in these cases are often undermined by the Hyde restriction. Teenagers are denied medically necessary abortions, even where the pregnant child, the physician and the parents concur that abortion is the apropriate and necessary response to pregnancy. Poor women are denied abortions, even when their husbands and children support the decision of the woman and her physician that a health threatening pregnancy should not be continued. *See: Carey v. Population Services International,* 431 U.S. 678 (1976), particularly the concurrence of Mr. Justice Powell.

ples demand that the woman's interest in preserving her life and health be accorded greater importance than the asserted interest in fetal life. Mr. Justice White, writing for himself and Justice Rehnquist in *Wade* and *Bolton*, carefully directed his dissent to recognition of the right to abortion for reasons other than preservation of women's "life *or health*". 410 U.S. at 221. In a separate dissent in *Wade*, Justice Rehnquist found that, even under the minimal rationality test applicable to economic and social legislation set forth in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955), abortion could not be completely prohibited. 410 U.S. at 173.

In *Maher*, Connecticut expressed "a value judgment favoring childbirth over abortion," 432 U.S. at 474, but this did not extinguish the health interest in the *Wade* balance. Funding was provided for all "medically necessary" abortions at all stages of pregnancy. To the extent that the private abortion decision had a medical dimension, the state stood ready to bear the medical costs for it.

Quite apart from the abortion context, this Court has recognized the essential importance of the individual interest in preserving life and health. In *Memorial Hospital v. Maricopa*, 415 U.S. 250 (1974), the Court characterized medical care as a "basic necessity of life," 415 U.S. 259, and struck down a policy denying nonemergency medical care to new residents, even though emergency services were made available. Legitimate state interests may not be pursued by means which impose a significant detriment upon individual health. *Carey v. Population Services International,* 431 U.S. 678, 716 (1977) (Stevens, J. concurring.)

The right to act to protect personal life and health has deep constitutional roots. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld a mandatory vaccination law on the ground that the state's interest in protecting public health was so strong as to override traditional rights of parents to determine the medical treatment appropriate for their children. Yet, notwithstanding the great weight of the public health concern, the Court made clear that the state could not compel an individual to be vaccinated:

> If it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination by reason of his then condition, would seriously impair his health, or probably cause his death. *Id.* at 39[157]

Finally, the interest which plaintiffs here assert in relation to medically necessary abortions is different than the interests considered in *Maher* because the evidence presented in the Court below established that the theological doctrine of mainstream Protestant and Jewish traditions teach that where pregnancy threatens a woman's physical or mental health, the woman and her physician are obligated to make a conscientious choice whether to continue the pregnancy or end it through abortion. *See* Facts, *supra*, §9. This theological evidence was not presented or considered in *Maher*.

---

[157] *See also: Estelle v. Gamble*, 429 U.S. 97 (1975). Mr. Justice Stevens states "denial of medical care is surely not part of the punishment which civilized nations may impose for crime." n. 13. Although he was dissenting on other grounds, there is no indication that the majority disagreed on this point.

B. The Hyde Restriction Places Enormous Burdens Upon Poor Women and Their Physicians.

In evaluating the constitutional fairness and reason of legislation touching upon individual rights and freedom, the Court considers the degree of the burden imposed. For example, a one year durational residency requirement imposes an unconstitutional burden on the right to vote and travel, *Dunn v. Blumstein*, 405 U.S. 330 (1972), but a 50-day residency requirement is constitutionally permissible, *Marston v. Lewis*, 410 U.S. 679 (1973). The sole distinction lies in the degree of the burden. Similarly in *Califano v. Jobst*, 434 U.S. 47 (1977), the Court upheld a policy having an incidental effect upon freedom to marry, but in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court invalidated a policy creating a more significant burden on that freedom. The impact of the Hyde Amendment is much greater than the effects found permissible in *Maher*.

The record shows four effects of the Hyde restriction, none of which were at issue in *Maher*. First, the Hyde restrictions have virtually eliminated federal funding for abortions, and have had the effect of denying federal funds even in the very limited category of life-threatening situations in which Congress intended that funds would be paid. *Supra* p. 22.

Second, the Hyde restriction has forced some women to carry health threatening pregnancies to term, with consequent aggravation of often precarious conditions. That was emphatically not the impact of *Maher*, where only elective, nontherapeutic abortions were involved. Some women have had no choice but to bear children that their physicians have every reason to believe will

be deformed. Some will suffer life long disability and face an earlier death. For others, particularly teenagers, future reproductive capacity has been destroyed. *Supra*, p. 47.

A third effect of the Hyde restriction has been to force women to deprive children of subsistance in order to obtain medically necessary legal abortions, or to obtain less espensive illegal abortions, or to perform abortions on themselves, at great risk to their life and health. *Supra*, p. 62. While these effects are an important part of the reality of the impact of the Hyde Restrictions, no one argues that the Congressional action can be justified in relation to a purpose of encouraging illegal or self-abortion or providing incentives for women to use their scarce food and rent money to purchase legal, necessary abortions. Where, as here, the evidence is that legislative action, in fact, fails to effectuate a constitutionally permissible purpose, those facts bear upon the question of constitutionality. *See e.g. Bellotti v. Baird,* 428 U.S. 132, 147, 179-80 (1976); *Carey v. Population Services International,* 431 U.S. 678 (White, J. concurring); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (White J. concurring); *Zablocki v. Redhail,* 434 U.S. 374 (1978).

The fourth impact of the exclusion of medically necessary abortions is to make it impossible for physicians to practice medicine in accordance with minimal professional standards. For the cancer patient for whom contraceptive pills are contraindicated, the physician must somehow decide whether it is preferable for the patient to run the very real risks of birth control pills or the risks of a health threatening pregnancy which cannot be terminated. *Supra,* p. 61, n.89. For the psychotic patient who, in order to preserve her sanity, requires drugs that may damage the fetus, the physician must somehow choose between real and substantial risks to the woman or to the fetus. The Hyde Amendment thus impermissibly forces doctors to weigh the health of the pregnant woman against the welfare of the fetus. This Court, in *Colautti v. Franklin*, observed that obligating physicians to "trade off" the potentially competing interests of a pregnant woman and a fetus "presents serious ethical and constitutional difficulties."439 U.S. at 400.

Severe burdens and penalties are imposed upon women and physicians by the withdrawal of Medicaid entitlement. These burdens and penalties are not constitutionally irrelevant simply because they are imposed in the context of a program providing benefits to the poor. While it is established that the mere fact that a classification denies essential services to the poor does not *ipso facto* call for closer constitutional scrutiny, it is equally clear that such classifications are not immunized from constitutional constraints. *See Califano v. Wescott*, 99 S. Ct. 2655 (1979), *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

Maher reaffirms that a "state-created obstacle need not be absolute to be impermissible," 432 U.S. at 473, and that the constitutionality of a policy limiting access to abortion "will depend [in part] upon its degree" (quoting *Bellotti v. Baird,* 428 U.S. 132, 149-50 [1976]). *Maher* also confirms that the pregnant woman is constitutionally protected "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473-74. The Tenth

Circuit Court of Appeals states, in striking down a restriction on Medicaid funds for abortion:

> There is no direct interference in the case before us in the sense of a criminal prohibition, but the state should not be able to make a value judgment to fund necessary medical procedures in all instances except when an abortion is the procedure found necessary. All distinctions between abortions and other procedures are, of course, not prohibited, but the one before us is a distinction applied to a particular condition or diagnosis, and not to all others. This is a distinction which has no relation to health care for which the funds are to be expended. It is difficult to see how this can be placed in a category of a "value judgment" by the state. *D.R. v. Mitchell,* No. 78-1675, slip op. at 7 (March 10, 1980).

See also Reproductive Health Services v. Freeman, supra.

C. The Nature of the Group Burdened by the Riders Suggests the Need for Careful Constitutional Consideration.

Often at the very heart of the constitutional limitations which due process and equal protection guarantees place upon legislative action is the recognition that some groups are:

> saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

The class affected here is, women who are poor, dependent upon welfare, and subject to health risks.

The Eighth Circuit, in a recent opinion which held exclusion of payments for medically necessary abortions unconstitutional, observed:

> [T]his is an area in which sensitive judicial review is particularly appropriate. The minority disadvantaged by Missouri's Medicaid exclusion is sex-specific and financially destitute. . . . These factors suggest "a special condition which tends seriously to curtail the operation of those political proceses ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4. . . . Any strong deference to the legislative process seems especially inapt where the minority asserts not only the fundamental interest in deciding whether to bear a child, which was the case in *Maher,* but the additional interest in preserving one's own health. *Reproductive Health Services v. Freeman, supra,* slip op. at 29-30.

Congressional action singling out medically necessary abortions and denying Medicaid entitlement for this one medically necessary service raises issues similar to those considered in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Mr. Justice Stewart, writing for the Court in *LaFleur* said:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive mater-

> nity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man" . . . the Due Process Clause . . . requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. 414 U.S. at 640.

See also Turner v. Department of Employment Security, 423 .U.S. 44 (1975) extending *LaFleur* to the protection of unemployment compensation.

Similarly in *Nashville Gas,* the Court unanimously condemned a policy requiring pregnant employees to take leaves of absence and to sacrifice accumulated seniority benefits. Mr. Justice Rehnquist, writing for the majority, said:

> [P]etitioner has not merely refused . . . to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the scheme of existence," 429 U.S. at 139 n. 17. But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of the different role. 434 U.S. at 142.

Similarly, here, while the refusal to expand Medicaid to include elective services needed only by women is

permissible under *Maher*, the denial of Medicaid for this single medically necessary service constitutes a penalty. The Congress has not "refused to extend to women a benefit" for elective non-therapeutic services that "men cannot and do not receive." Rather, by taking affirmative action to destroy entitlement for this one medically necessary service, Congress has "imposed on women a substantial burden that men need not suffer." [158]

---

[158] This case presents issues very different than those considered by this Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric v. Gilbert*, 429 U.S. 125 (1976). There the Court relied upon the fact that "*normal* pregnancy is an objectively identifiable physical condition with unique characteristics," 417 U.S. 496 n.20, which "is often a voluntarily undertaken and desired condition." 429 U.S. at 136. Pregnancy calling for a medically necessary abortion is, by definition, neither voluntary nor desired.

In *Aiello,* the Court found that the exclusion of benefits for normal childbirth was justified by California's legitimate interests in

> maintaining the self-supporting nature of its insurance program . . . distributing the available resources in such a way as to keep benefit payments at an adequate level from disabilities that are covered . . . [and] maintaining the contribution rate at a level that will not unduly burden participating employees. 417 U.S. 496.

Obviously these justifications are not applicable here. In *Califano v. Westcott*, 99 S. Ct. 2655, 2663 (1979), a unanimous Court held that even in the welfare context, "Congress may not legislate 'one step at a time' when that step is drawn along the line of gender. . . ." The invalidity of the Hyde restriction is even plainer since exclusion of a single necessary service from an otherwise comprehensive program to meet medical need is, for the women affected, more like a step down an elevator shaft than the incremental sort of step invoked by the traditional language. The fiscal realities render inappropriate any deference to legislative allocative discretion. *See* p. 130, n.161, *infra.*

An official policy denying funds for medically necessary abortions has an obvious, sex-specific impact. A sex-blind analysis of the issue embodies a special irony. Historically the law sanctioned restraints on women's rights, responsibilities and opportunities, by exaggerating the burdens and incapacities attending women's role as mother.[159] Now by adopting an affirmative policy that denies poor women the means to control reproduction, Congress imposes burdens which would make the stereotype a self-fulfilling prophecy for poor women.

D. No Legitimate Purpose is Served by the Hyde Restriction.

The final factor that must be considered in determining whether legislative action violates the constitutional guarantees of due process and equal protection is the public purpose the legislation is designed to service or the purposes that may, as a hypothetical matter, be served by it.

Maher holds that because the state has a legitimate interest in encouraging normal childbirth and protecting potential life, it is not constitutionally compelled to extend Medicaid funding to include elective abortions. 432 U.S. at 474. In the district court, HEW relied upon *Maher*, and characterized the Hyde restriction as furthering an "interest in encouraging childbirth;"[160]

---

[159] *See Muller v. Oregon,* 208 U.S. 412 (1908); *Goesart v. Cleary,* 335 U.S. 464 (1948); *Hoyt v. Florida,* 368 U.S. 57 (1961). *Compare, for example, Reed v. Reed,* 404 U.S. 71 (1971); *Craig v. Boren,* 429 U.S. 190 (1976).

[160] *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction,* Aug. 2, 1977, R.64, p. 9. This earlier memo was adopted by and appended to *Defendant's Post Trial Memorandum of Points and Authorities,* Nov. 10, 1978, R.165, pp. 54-55.

before this Court in *Zbaraz,* HEW asserts that the Hyde restrictions reflect "the desire to encourage normal childbirth . . . ." Brief of the United States, p. 55.

The distinction is critical: only an interest in "normal" childbirth will suffice as a matter of law. Yet the medical evidence demonstrates, in exacting detail, that the denial of medically necessary abortions does not further an assumed governmental interest in encouraging normal childbirth. *Supra* pp. 13-50. Just as the Court consistently limited the decisions in *Beal* and *Maher* to "elective" or "non-therapeutic" abortions, the Court was also careful to characterize the state's legitimate interest in the limited terms of "encouraging *normal* childbirth." This limitation, built into the interest there asserted by the state, is consistent with minimal rationality and mandated if the state is to avoid the basic irrationality of denying payments where the result is to impair, perhaps irrevocably, a woman's health. *Beal* and *Maher* give no license to preferring childbirth at any cost, yet that is precisely what the Hyde exclusions in fact do.

The district court in *McRae v. Harris* read "*Beal*, *Maher*, and *Poelker* as cases in which there was no health care need for abortion." Slip op. at 311. The district court further found that in the course of treating a patient eligible for Medicaid, a physician will often make an

> appropriate medical judgment, for the preservation of the life or health of the mother," *Roe v. Wade*, 410 U.S. at 165, that abortion is medically necessary . . . . To deny the appropriate medical assistance to the patient in need of medical assist-

ance and remit her to a less appropriate medical course and abandonment of her fundamental right of choice, or else to resignation of Medicaid benefits, is not called for by *Maher v. Roe* and is forbidden by the principle it reaffirms. Slip op. at 312.

The government purposes served by the Hyde restrictions are hence critically different from those considered in *Maher*. In *Maher* and *Beal* state Medicaid officials, in the wake of *Roe v. Wade*, responded to the changed legal status of abortion by providing funding for abortion on the same basis as other Medicaid services, i.e., where the services were medically necessary. 432 U.S. 438, 445 n. 9 (1977). Here, by contrast, Congress acts affirmatively to eliminate Medicaid entitlement to medically necessary services. As Judge Dooling found, "the impact of the Hyde amendments is not to influence the pregnant woman toward normal childbirth, for that is not medically possible, but to frustrate her making, in consultation with her physician and for medical reasons," the choice whether to abort or to have a child. Slip op. at 311.

HEW now asserts a new interest in support of the Hyde restriction, "the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant." Brief of the United States, p. 55. Given the fiscal realities,[161] it is certainly not the interests of taxpayers, *qua* taxpayers, that supports the

[161] Mr. Justice Stevens correctly observed, in denying the state's application for a stay in *Williams v. Zbaraz*, that "it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full term pregnancy." 99 S.Ct. 2095, 2098 (1979).

government's affirmative action eliminating plaintiffs' Medicaid entitlement to medically necessary services. *Ex hypothesis*, whenever Congress acts it is because a majority of people, or as in this case, a highly mobilized minority, support the action taken.[162] But this "jusitification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate." *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1976). The premise of our constitution is that the power of the majority is limited, and that the Judicial branch has the sometimes difficult responsibility of protecting constitutional rights against the excesses of majoritarian expedience. *Marbury v. Madison*, 1 Cranch 137 (1803).

The government's assertion of the "moral interests" of taxpayers presumably refers to the fact that some people believe that human life begins at conception, and hence desire to prevent abortion as a form of infanticide.[163] The Hyde restrictions are justified as a

[162] For opinion surveys on attitudes toward abortion see slip op. at 33, 37, 166-68 and fn. 91.

[163] Other taxpayers may disapprove of sexual activity among the poor and believe that poor women should be forced to bear the consequences of sexual relations. This Court said in *Roe v. Wade*, "no court or commentator has taken the argument [that abortion may be denied as a means of discouraging sexual activity] seriously." 410 U.S. at 148. In *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972), the Court explained "It would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."

The Amendments deny funds to the married and the unmarried alike, and hence it cannot be argued that they are designed to discourage extramarital sexual activity. If the purpose of the Amendments is to discourage sexual activity solely on the part of poor women, including those who are married, their constitutional invalidity is self-evident. These interests do not become stronger because they are asserted in the name of taxpayers.

form of symbolic statement. The statement is not that some taxpayers believe that abortion is wrong, but rather that abortion is so clearly wrong that Congress can insist that poor women conform their conduct to these moral views by destroying existing Medicaid entitlement.[164]

The government's assertion that the Hyde Amendments serve a purpose of accomodating the moral beiefs of some taxpayers is very close to its asserted purpose of protecting the fetus. This very issue was at the heart of *Roe v. Wade*. The Court found that the state, "by adopting one theory of life," may not "override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

This Court made plain in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, that even at "the stage subsequent to viability, the state in promoting its interest in the potentiality of human life," may not create regulations which deny women abortions "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." The Court has carefully and firmly delineated these limits to governmental authority to protect potential human life. The Riders cannot be justified by this interest since they do not allow payments for abortions necessary to preserve the health of the woman at any stage

[164] To allow funding for medically necessary abortions, on the same terms as all other medically necessary services, does not imply governmental approval for abortion any more than governmental approval of people living in sin can be implied from the fact that the Constitution requires that otherwise qualified individuals be allowed to receive welfare whether or not they are married. *See e.g., New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973), striking a state law limiting welfare for both parents and children when the parents were unmarried.

of her pregnancy. If the government cannot demand that the woman's health be sacrificed or jeopardized to further the compelling interest of protecting potential life *after* the point of viability, it follows *a fortiori* that the government cannot rest upon its interst in protecting potential life at earlier stages of pregnancy.

As we demonstrate more fully, Facts, *supra,* § 9, abortion raises profound moral and religious questions. Yet one need not conclude that abortion is an aspect of religious choice protected by the First Amendment to assert that where, as here, moral and religious opinion is strong and sharply divided, the moral objections of some taxpayers do not justify affirmative governmental action denying entitlement to services essential to protect individual health. The asserted rationale sweeps too broadly.[165] The fact that the government asserts this as a justification for Congressional action denying Medicaid entitlement indicates recognition of the absurdity of the assertion that the government seeks to encourage "normal" childbirth by denying necessary medical services.

Obviously the Constitution affords wide latitude to those "charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. . . ." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). As the Court there noted, "conflicting claims of morality and intelligence" are raised by every choice whether to allocate funds to meet the undeniably brutal need of families who stay together or are deprived of a parent, families who work or those unable to do so, the young, the old, the dis-

[165] For example many citizens opposed miscegenation on strong moral and religious grounds. *See Loving v. Virginia,* 388 U.S. 1 (1967).

abled.[166] However, *this is not such a case*.[167] Abortion presents the only situation in our history, in which poor people ask that they be afforded a less costly benefit, and the government insists that they may only have one that is far more costly both in terms of the public fiscal cost and in terms of the sacrifice demanded of women's life and health.

E. The Actual Purpose of the Hyde Restriction is to Penalize the Exercise of Constitutional Rights.

After detailed and careful examination of the legislative history, the lower court found that:

> The debates make clear that the amendment was intended to prevent abortions, not shift their cost to others, and rested on the premise that the human fetus was a human life that should not be ended. Slip op. at 21.[168]

[166] *See e.g., Jefferson v. Hackney,* 406 U.S. 535 (1972); *Wyman v. Rothstein,* 398 U.S. 275 (1970); *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977); *Richardson v. Belcher,* 404 U.S. 78 (1971). The political branches have been afforded similar discretion in making the tax judgments that are often necessarily arbitrary. *Kahn v. Shevin*, 416 U.S. 351 (1974).

[167] Apart from fiscal constraints, "administrative convenience" provides the most common justification for allegedly discriminatory classifications in government benefits programs. All the evidence is that the Hyde standards, because they are foreign and incomprehensible to physicians, do not solve but rather *create* problems for Medicaid administrators. Facts, *supra,* § 6. Administrative convenience would dictate that abortion be treated like all other medical services and financed when, in the physician's judgment, it is medically necessary.

[168] This Court has held that, in these circumstances, "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *U.S. Department of Agriculture v. Moreno*, 413 U.S. at 534.

The denial of payments is precisely for the *purpose* of depriving women and their physicans of the constitutional freedom to choose medically necessary abortions. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States v. Jackson,* 390 U.S. 570, 581 (1968)." *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969).

This Court has consistently held that:

> if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

In *Moreno* the federal statutory provision denied food stamps to people who lived in households containing individuals who were not related by blood or marriage. The legislative history indicated that the actual purpose of the restriction was to deny food stamp benefits to "hippies" and "hippy communes."

The constitutional invalidity of the Hyde restrictions is more blatant than the claim accepted in *Moreno*, since the restriction there would have had an incidental effect that is legitimate, *i.e.*, saving public funds. Here the incidental effects are: required sacrifice of women's life and health, as well as increased public expenditures, and vast complication of Medicaid administration and medical practice. Further, here there is a firm constitutional base for the right to choose

abortion, while there the constitutional right of unrelated people to establish a household is, at best, uncertain.[169] *See also, Weinberger v. Salfi,* 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero,* 426 U.S. at 605 (1976).

Because the Hyde restrictions are enacted, year after year, as riders to appropriations measures, the Congressional committees with responsibility for Medicaid have never considered the relation between the Hyde exclusion and the general statutory mandate of funding for all medically necessary services. This Court has observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Village of Arlington Heights v. Metropolitan Housing Development,* 429 U.S. 252, 267 (1977). *See also, Whalen v. Roe,* 429 U.S. 589 (1977) in which this Court upheld a New York drug statute partly on the basis that it was "manifestly the product of an orderly and rational legislative decision." *Id.* at 597.

The stark reality is that the Hyde restriction serves no legitimate governmental interest, seriously undermines the Medicaid program's core purpose of promoting the health of poor people, and mandates the sacrifice of the lives and health of poor women, by denying entitlement to a medically necessary service.

[169] *Contrast Moore v. City of East Cleveland,* 431 U.S. 494 (1977) with *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

III.

THE HYDE EXCLUSION CREATES A CLASSIFICATION THAT VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAW.

The Hyde exclusion imposes enormous burdens on the fundamental interests of a particularly vulnerable group and hence must be justified by important governmental interests. The right to choose whether to have an abortion or to bear a child is unquestionably fundamental. *Roe v. Wade*, 410 U.S. 147, 152-53 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. at 640 (1974); *Zablocki v. Redhail*, 434 U.S. at 386 (1978). *Maher* recognizes that the right to choose abortion is fundamental, and affirms that the decision "signals no retreat from *Roe* or the cases applying it." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

All of the factors that distinguish this case from *Maher* also dictate that the discriminatory classification created by the Hyde exclusions be judged by a standard more rigorous than that applied in *Maher*. When "statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).[170] Even in cases involving no suspect classification or fundamental constitutionally protected right, this Court has required that:

[170] See also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Powell concurring).

> In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 725 (1973) (Rehnquist, J.); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)(Black, J.); *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969); *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall dissenting).[171]

Consideration of each factor points to the constitutional infirmity of the discriminatory classification.

Furthermore, the classification is not reasonably related to any legitimate government purpose. In *Maher*, where the state did no more than refuse to expand Medicaid coverage to include elective abortion services for which there would otherwise be no statutory entitlement, this Court required that the state policy be "rationally related" to a "constitutionally permissible" purpose. 432 U.S. at 478. The Court demanded that a "reasonable basis" for the state's "strong and legitimate interest in encouraging normal childbirth." *Id.* at 478. Even in that very different context, this Court reaffirmed that once the government "decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Id.* at 469-70. It is long settled that even where no fundamental rights or suspect classifications are involved, legislative classifications must be reasonably related to some legitimate purpose. *Carrington v. Rash*, 380 U.S. 89 (1965); *James v. Strange*, 407 U.S. 128 (1972); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 653, n.2 (1974) (Powell, J., concurring in the result on grounds that even a non-suspect classification "must at least rationally serve some legitimate articulated or obvious state interest.")

[171] In *Vlandis v. Kline*, 412 U.S. 441, 458 (1973), Mr. Justice White observed, "it is clear that we employ not just one, or two but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards' in reviewing discrimination allegedly violative of the Equal Protection Clause," quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (1973).

IV.

THE HYDE EXCLUSION PENALIZES VULNERABLE CITIZENS, FAILS TO MEET MINIMAL STANDARDS OF FUNDAMENTAL FAIRNESS AND HENCE DENIES DUE PROCESS OF LAW.

Mr. Justice Harlan once described the liberty protected by the Due Process Clause as a:

> rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Poe v. Ullman*, 367 U.S. 497, 543 (1961). See also *Roe v. Wade*, 410 U.S. 113, 169 (Stewart, J., concurring).

It is settled that the "liberty" protected by the Due Process Clause of the Fifth Amendment embraces more

than those freedoms expressly enumerated in the Bill of Rights. See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Zablocki v. Redhail*, *supra*; and *Cleveland Board of Education v. LaFleur*, *supra*. It is also settled that Due Process protects the right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The constitutional protection of life and liberty shields the individual from arbitrary governmental action demanding sacrifice of life or health, *supra*, pp. 116-20, though it must be conceded that there are few cases considering the question because the government so rarely demands sacrifice of individual life and health, apart from situations of paramount national defense.

The Hyde restriction has resulted in the sacrifice of the right to choose whether to bear a child where pregnancy is medically contraindicated. It demands that poor pregnant women disregard their own wishes, the needs of their families, the advice of their physicians, and place their health and life in jeopardy. The denial of entitlement for medically necessary abortions forces women either to continue health-threatening pregnancies, to bear the substantial risks of illegal or self-abortions or to use meagre funds to procure legal abortions. The precise purpose of the restriction is to impose a burden upon a sex specific group for the exercise of a fundamental right. This does not meet minimal constitutional standards of fundamental fairness.

The liberty protected by the Due Process clause prohibits the accomplishment of even legitimate government goals by means which unnecessarily expose individuals to danger. Mr. Justice Stevens' simple analogy in *Carey v. Population Services International,* 431 U.S. 678 (1977) is applicable here. Even though he found that the state objective of deterring sexual conduct among teenagers was legitimate, the method chosen to accomplish that goal—proscribing contraceptives—was illegitimate because it imposed a significant detriment on the minors' health.

> Although the state may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of govern-

> ment-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law. 431 U.S. at 715-16.

In *Zablocki v. Redhail*, at 394-395, Mr. Justice Stewart held that it violates due process to require poor people who seek to marry first to prove that they have met their support obligations to existing children. "To deny these people permission to marry penalizes them for failing to do that which they cannot do." *Id.* at 394. See also *Nashville Gas v. Satty*, and *Cleveland Board of Education v. LaFleur*. Similarly here, to affirmatively deny poor women funds for medically necessary abortions penalizes them for failure to do what is impossible. None of the named plaintiffs can aid the government in its asserted purpose of producing "normal" children. They cannot make themselves whole or healthy. The government, in denying their entitlement to medically necessary services, harshly penalizes them for their misfortune.

V.

THE HYDE AMENDMENT IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

The trial court held:

> The strangeness to medical thinking of "life endangerment" as the factor decisive of the use of a medical procedure is shown by the medical evidence, and is an added element relevant to the application of the rationality test. The meagre

> statistics on abortion since the Hyde Amendment bear out the view emerging from the medical evidence: the life endangerment test is so uncertain of meaning in terms of medical content that it operates to restrict the use of abortion procedure in Medicaid to the narrowest classes of cases, to crisis intervention. It seems to function to exclude many more cases than can be supposed to have been intended for exclusion because of the physicians' inability to divine what medical standards it implies. Slip op. at 322-323.

The Hyde Amendment "life endangering" standard is so vague that doctors are chilled from authorizing even those abortions that were intended to qualify for reimbursement, because of the realistic threat of federal investigation with criminal or civil sanctions for those certifications later administratively deemed unwarrantedly broad interpretations of the restriction. To avoid these sanctions, doctors cautiously interpret the ambiguous Hyde standard narrowly, with the result, as the trial court found, that Medicaid abortions are limited to the "narrowest classes of cases, to crisis intervention." Thus, the vagueness of the Hyde standard chills exercise of the fundamental right to abortion even in situations where Congress would consider Medicaid reimbursement necessary and appropriate. No governmental interest is furthered by that result.

The trial court found, upon ample and largely undisputed evidence, that "life endangering" is not a standard that doctors routinely use, and they do not know what it means. Slip op. at 91. The standard is vague on its face and as applied. For instance, how certain must the danger to life be? 90%? 75%? How imminent must

the danger be? Is a statistical increase in the *risk* of life endangerment sufficient, and if so, how substantial must that increase be? Is a woman's life endangered within the meaning of Hyde if the danger, though clear, could theoretically be controlled by costly alternatives, such as full-time hospital bed rest, which are not available to poor women? Or, is a reasonable likelihood that the woman's life would be shortened enough? In enacting an exception for severe and long-lasting physical health damage to the 1978 and 1979 Riders, Congress obviously did not intend that such adverse effects were within the meaning of life endangerment. Annex to slip op. at 236, 237.

Congress and HEW have not further defined the Hyde standard, and have issued no regulations that would answer these questions or clarify the ambiguities inherent in the standard. 42 C.F.R. § 50.304 (1978); *see* 43 Fed. Reg. 4570, 4574 (1978). Thus doctors must answer these questions for themselves, creating realistic risks of arbitrary and unequal application of the law, and of possible criminal sanctions if doctors guess wrong.[172]

The Medicaid program contains a comprehensive scheme of federal criminal sanctions for Medicaid fraud and abuse, 42 U.S.C. § 1396, enforceable against

[172] The highly polarized abortion debate is conducive to ideologically motivated, discriminatory prosecutions of doctors who perform abortions. The recent literature unfortunately abounds with incidents of attempts to use the criminal prosecution of doctors as a technique to inhibit abortion, even in the Medicaid context. Cf. *Orr v. Nebraska Department of Public Welfare*, No. 80-031 (D.Neb. Jan. 25, 1980) (Preliminary injunction against civil action or criminal prosecution of abortion provider based upon claims for Medicaid reimbursement). *Floyd v. Anders*, 440 F.Supp. 535 (D.S.C. 1977) (three-judge-court), *remanded*, 440 U.S. 445, March

both physicians and their patients.[173] In addition, the federal government requires states to pursue investigations and prosecutions of Medicaid fraud as a condition of participation in the Medicaid program. 42 C.F.R. § 455.12 *et seq*. (1979).[174]

HEW has made clear to physicians that it is reasonable for them to fear prosecutions for "fraudulent" cer-

5, 1979 (*per curiam*); *Commonwealth v. Edelin*, 359 N.E. 2d 4 (Mass. 1976); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972) (directed verdict for defendant); *Dr. Pablo Quiroga v. Medical Practice Board, et al.*, No. 77-20461-AA (Cir. Ct. for Cty. of Ingham, Mich., filed 1977). See also *Women's Right, Physician's Judgment: Commonwealth v. Edelin and a Physician's Criminal Liability for Fetal Manslaughter*, 4 Women's Rights Law Reporter 97 (1978).

[173] Under the federal statute, the making of a false statement by a physician or a recipient in an application for payment is a felony, punishable by imprisonment up to five years, or a fine of up to $25,000, or both, even if the Medicaid payment is never made. 42 U.S.C. § 1396h (a). The same section makes it a misdemeanor for a doctor to make an application which contains a false statement by a person other than the doctor. A physician convicted of an offense related to the provision of Medicaid services is automatically suspended from Medicaid practice by the Secretary for whatever period the Secretary "deems is appropriate". 42 U.S.C. § 1395. The Medicaid statute also contains a blanket prohibition of payment if the Secretary determines the provider has "knowingly and willfully made or caused to be made any false statement or representation of a material fact for use in an application for payment." 42 U.S.C § 1395.

[174] Under this regulation, state criminal penalties for fraud may be imposed on doctors. Although the Medicaid regulations place primary responsibility for discovering and prosecuting fraud on the state, the federal government retains the right to initiate federal prosecutions under Title XIX, (*see* fn. 173 *supra*), or under other titles of the U.S. Code, e.g.: 18 U.S.C. § 286 (conspiracy to obtain payment from the U.S. government on a false claim); § 287 (presenting a false claim); 18 U.S.C. § 1001 (concealment of a material fact or making a false statement to the government).

tifications under this ambiguous Hyde standard.[175] And HEW and Congress have repeatedly warned doctors that their Medicaid abortion certifications will be subjected to more rigorous scrutiny than any other Medicaid procedures. The 1977 Hyde Amendment specifically required that "the Secretary shall establish procedures to ensure that the provisions of this section are rigorously enforced." [176]

Of course a physician cannot be required to run the risk of a penalty for a "fraudulent" certification that a patient's life would be endangered if pregnancy were carried to term. Medicaid doctors are not required to serve their poor patients; they can inform patients that, notwithstanding the fact that the pregnancy poses health risks, they cannot provide the needed

---

[175] In response to a plaintiff's inquiry concerning HEW's plans to monitor for fraud, the U.S. Attorney responded that ". . . we envision investigations of individual cases upon either direct or circumstantial evidence of fraud . . . circumstantial evidence would probably consist of the performance by a physician . . . of a significantly higher rate of certified abortions as compared to a 'normal' rate to be established on the basis of regional or nationwide experience under the Hyde Amendment." (Pl. Exh. 12/T. 933). Permitting a statistical inference of fraud is highly misleading since many abortions are done by specialist physicians and clinics (Teitze, T. 935); in many areas most abortions are performed at specific hospitals, e.g. the University of Michigan hospital (Eliot, T. 404); physicians who serve a high risk population, e.g. poor teenagers, will legitimately encounter higher than "average" numbers of life endangering pregnancies (Hofmann, T. 1282-89).

[176] The Secretary's comments on the January 26, 1978 implementing regulations concluded:

> It must be noted that any person who knowingly submits a falsified claim for Federal funds, or who aids or abets the submission of a falsified claim, may be subject to prosecution under section 1909 (a) of the Social Security Act or another applicable provision of the law. 43 Fed. Reg. 4832, 4842 (1978).

medical service unless sure of payment. This raises serious legal and ethical problems for the doctor. Or the doctor may perform the abortion free, an option not available to physicians who perform abortions only in hospitals, or whose patients need hospital abortions. Two plaintiff doctors testified that their hospitals would not approve admissions unless payment was assured by Medicaid or the patient. (Hodgson, T.49; Bingham, T.487-88.) Moreover, many Medicaid women will need second trimester abortions, usually performed only in a hospital. Slip op. at 76. (Romney, A.221-22.) The option of denying services which the patient seeks, and which the doctor believes are necessary, was also open to Doctors Franklin and Vuitch in *United States v. Vuitch*, 402 U.S. 62 (1971), and *Colautti v. Franklin*, 439 U.S. 379 (1979). This Court made no suggestion that the vagueness claims in their cases could be avoided on the ground that they could simply refuse to treat their patients. Given these facts, the trial court's conclusion that the "life endangering" standard is void for vagueness is not only consistent with, but compelled by, previous decisions of this Court. It is settled that statutes which abridge fundamental rights must be framed narrowly, and with precision; that they must provide fair notice of what they permit and proscribe; and that they must provide sufficient guidance to enforcement officials to prevent excessive discretion or abritrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 170 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Harris*, 47 U. S. 612, (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385

(1926). The Hyde standard is impermissibly vague under each of these tests.

In *United States v. Vuitch*, 402 U.S. 62 (1971) this Court upheld the District of Columbia criminal abortion statute which prohibited abortion unless "necessary for the preservation of the mother's life or health," by construing the statute to avoid the constitutional problem of vagueness. Adopting a lower court's construction of the same statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defect," this Court observed:

> Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered. 402 U.S. at 72.

Similarly, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) this Court held Missouri's definition of viability not impermissibly vague, but only because it allowed doctors the flexibility to exercise medical judgment:

> . . . we recognized in *Roe* that viability was a matter of medical judgment, skill and technical

> ability, and we *preserved the flexibility* of the term. Section 2(2) does the same. *Id.* at 64 (emphasis added).

In a concurring opinion, Justice Stewart, joined by Justice Powell, noted:

> While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's professional decision to perform an abortion will be "chilled." *Id.* at 89.

In contrast, the evidence in *McRae* establishes, as the trial court found, that physicians' judgments have in fact been chilled by the vagueness of the Hyde standards, and the realistic possibility of criminal prosecution of doctors who erroneously conclude that a pregnancy is life endangering.

Colautti v. Franklin, 439 U.S. 379 (1979) also emphasized the uncertainties inherent in medical decision making, and the corresponding need for regulatory statutes to give doctors sufficient breadth to exercise their best medical judgments. Distinguishing *Vuitch* and *Bolton*, which upheld statutes against a vagueness challenge, this Court noted:

> The contested provisions in those cases had been interpreted to allow the physician to make his determination in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead it condi-

tions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.[177] *Id.* at 394.

[177] Prior to 1973 several courts struck down abortion statutes on vagueness grounds. In *Roe v. Wade*, 314 F. Supp. 1217 (D. Tex. 1970), *aff'd on other grounds*, 410 U.S. 113 (1973), the three-judge court which held invalid a Texas law prohibiting abortions except "for the purpose of saving the life of the mother," observed the statute's "grave and manifold uncertainties":

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an unascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? . . . Is it sufficient if having a child will shorten the life of the woman by a number of years? (Emphasis in the original.) *Id.* at 1223.

In addition, the California Supreme Court invalidated that state's criminal abortion statute, which excepted from penalty only those abortions "necessary to preserve" the life "of the pregnant woman." *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Reptr. 354, 458 P. 2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970). The Court stressed the inherent ambiguity in the language and the various interpretations of it offered by the doctors.

Identical language was also struck down in Illinois in *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971). The Court there found that the:

> practical effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. *Id.* at 1389.

VI.

THE HYDE ADMENDMENTS ARE INVALID UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Congress recognized the necessary interrelationship between choice of medical service and religious and conscientious belief when it established the Medicaid program. Excepting an overriding public health justification, as in the case of contagious disease, 42 U.S.C. § 1396f prohibits compelling any form of medical service against a person's religious beliefs.

This provision protects a Jehovah's Witness' refusal to accept a blood transfusion and the concomitant necessity to fund alternative medical care. They protect the strictly observant Catholic's right to refuse artificial birth control as well as her right not to consider abortion. Until enactment of the Hyde Amendments, they protected equally the right of poor women to have a medically necessary abortion in accordance with the dictates of their faith and conscience.

The Hyde Amendments thus destroy not only the guarantee of comprehensive medical care for the poor, but also the universal guarantee of liberty of conscience. They condition entitlement to necessary health care on abandonment of religious and conscientious convictions that abortion is appropriate. Moreover, the free exercise of conscience is unqualifiedly guaranteed to those whose moral convictions preclude even entertaining the possibility of abortion. The riders thus deprive the program of the neutrality which was its goal

and which is constitutionally required by the Free Exercise Clause of the First Amendment. The preservation and maximization of religious liberty can only be accomplished by restoring the funding for medically necessary abortions excised by the riders.

In *Maher v. Roe*, this Court took pains to point out that different and more exacting standards govern the allocation of benefits where religious liberty guaranteed by the First Amendment is at stake. 432 U.S. at 474 n. 8. *Maher* did not consider the religious freedom dimensions of the abortion decision. Here, by contrast, the question was fully explored.

A. The Right to Make and Effectuate a Conscientious Decision about Abortion is Protected by the Free Exercise Clause of the First Amendment.

The right to make and effectuate a conscientious decision about abortion is encompassed within the First Amendment's concept of the free exercise of religion. As the district court properly recognized, the protection of the First Amendment embraces the exercise of religiously-formed conscience on a matter of such ultimate dimension. Slip op. at 326-28. The court wrote:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation. Slip op. at 328.

Although abortion is not a religious rite or ritual, it ranks as a paramount concern in all major religious traditions. For those of the anti-abortion faiths, abortion is a grave sin, interrupting God's creation and analogous to murder. In the pro-choice faiths, consideration of questions of the preservation of the health and well-being of existing life and of responsible parenthood likewise rank among the highest obligation of human beings toward one another and toward God.

The district court correctly recognized that the teachings of the pro-choice faiths "in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures. *Wisconsin v. Yoder*." Slip op. at 327. The Free Exercise Clause protects not only the right to believe (or disbelieve), *Torcaso v. Watkins*, 367 U.S. 488 (1961), but also the right to practice one's beliefs, *i.e.*, to act in accordance with them. *McDaniel v. Paty*, 435 U.S. 618 (1978). The practice of religion encompasses apparently mundane activities or decisions about daily life which are "rooted in religious belief" rather than personal preference. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Significantly, the claim of conscientious objection to military service provided the opportunity for recognizing that the concept of religion embraces religiously grounded conscientious decision. "[F]reedom of conscience itself implies respect for an innate conviction of paramount duty." *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting).[177]

United States v. Seeger recognized as religious,[178] that belief "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption . . . ." 380 U.S. at 176.

Like conscientious objection to military service, the abortion decision demands the protection of the Free Exercise Clause. Pregnancy ineluctably requires imme-

[177] Judge Hand's formulation in *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943), is frequently cited:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow men and to his universe. . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. . . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

[178] Though *Seeger* involved statutory interpretation of the conscientious objector exemption rather than a constitutional holding, the expansive interpretation was influenced by the concern for avoiding preferential treatment of the traditional believer as compared to the non-traditional one. *United States v. Seeger*, 380 U.S. at 176; *see*: *Welsh v. United States*, 398 U.S. 333 (1970) (Harlan J., concurring). In *Gillette v. United States*, 401 U.S. 437 (1971), the selective objector claim, found to be outside the statutory exemption, nonetheless triggered scrutiny under both the Free Exercise and Establishment Clauses.

diate, direct, intimate and profound confrontation with questions of life and death. The response may be immediate and instinctive or the result of a long, soul-searching process.[179] For some women, the fetus is inviolable, and conscience precludes consideration of abortion even at tremendous risk to life and health. For others, pregnancy requires balancing the potential of human life against questions of survival, purpose, lifelong responsibility, and ultimately the meaning of human existence and fulfillment. For these women, conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy.

The district court properly recognized that governmental action which interferes, directly or indirectly, in this religious and conscientious decisionmaking process—either by requiring abortion or coercing childbearing—violates the Free Exercise Clause. Slip op. at 328.

[179] In *United States v. Seeger*, this Court looked to contemporary definitions of religion which are particularly applicable to the matter of abortion. For example, a Vatican II draft declaration of the Church's relations with non-Christians states:

> Men expect from the various religions answers to the riddles of human condition. What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment and retribution after death? 380 U.S. at 182.

Among those quoted who describe internally as well as externally derived belief was Dr. Paul Tillich who writes of God as the source of the affirmation of meaning within meaninglessness, 380 U.S. at 187, and explains:

> And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God. . . . Tillich, The Shaking of the Foundations 57 (1948) (emphasis supplied).

B. The Hyde Amendments Impermissibly Burden the Free Exercise of Those Whose Religious and Conscientious Convictions Counsel Consideration of Abortion.

Because this case arises in the context of an existing structure of Medicaid entitlement, it presents only the issue of whether the government may "exact. . . surrender of. . . religious scruples," as a condition of access to that program. *Sherbert v. Verner*. 374 U.S. 398, 412 (1963) (Douglas, J., concurring). If the government had not undertaken to guarantee comprehensive medically necessary services to the poor, the absence of funding for medically necessary abortions would not raise First Amendment questions. The impermissible and discriminatory impact on free exercise arises because the government has undertaken to provide for the medical needs of indigent pregnant women and withdrawn one service, abortion, from the spectrum of services funded.

Unlike *Sherbert*, this case does not involve a claim that special treatment is constitutionally required to accommodate religious practice. *cf. Sherbert v. Verner*, 374 U.S. at 422 (Harlan, J., dissenting). Congress has already acted to guarantee "an atmosphere of hospitality and accommodation to individual belief and disbelief," *Sherbert v. Verner*, 374 U.S. at 415-16 (Stewart, J., concurring), by protecting religious liberty against coercion stemming from the provision of health services under the Medicaid program. Plaintiffs therefore do not seek exemption from restrictions generally applied to Medicaid recipients, but ask only that they be afforded the right, specifically guaranteed all others, to choose in accordance with the dictates of their conscience the medically appropriate treatment.

1. The Hyde Amendments Severely Burden Religious and Conscientious Determinations Regarding Childbearing.

Following this Court's indication in *Maher*, 432 U.S. at 474 n. 8, that restrictions on welfare benefits which burden free exercise draw special scrutiny, the district court properly concluded that the withdrawal of funding for medically necessary abortions impermissibly coerces childbirth in situations "undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. at 218; slip op. at 326-28.[180] *Maher* adverted to the principle firmly established in *Sherbert v. Verner*, that even a facially neutral eligibility requirement must give way if it pressures plaintiff to forego abandonment of religious practice:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. at 404.

To retain their entitlement to health care for pregnancy, Medicaid eligible women must forego their religious and conscientious determination whether to

---

[180] *See* Facts *supra*, §9(b).

continue a pregnancy and submit to the state's determination that childbearing, even if health-endangering, is the required response to pregnancy.

Once government has voluntarily undertaken to provide public benefits, it cannot place conditions on them that exact surrender of religious scruples. *Sherbert v. Verner*, 374 U.S. at 405. The government may not use denial of a public benefit to achieve what it cannot command directly. *Elrod v. Burns*, 427 U.S. 347, 361 (1976); *Speiser v. Randall*, 357 U.S. 513 (1958). *Sherbert* squarely rejected the contention that the denial of benefits is constitutionally innocuous where it does not involve criminal sanctions and operates indirectly to burden religious exercise. 374 U.S. at 403-04.[181] "[T]o condition the availability of benefits upon . . . [a woman's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406.

The pressures created by the withdrawal of Medicaid funds for abortion under the Hyde Amendments im-

[181] Plaintiffs-appellees have already discussed the inapplicability to this case of the distinction between penalty and deterrent analysis suggested in footnote 8 in *Maher*. Moreover, footnote 8 cannot be read to apply this distinction to impediments to free exercise without undoing the core principle of the First Amendment that rules which directly or indirectly operate as prior restraints or have a deterrent effect on the exercise of expressional freedoms are constitutionally suspect. *See*, e.g., *NAACP v. Alabama*, 357 U.S. 459 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958); *Murdock v. Pennsylvania*, 319 U.S. 105, 112-14 (1943). Indeed, one year before *Maher*, the Court reaffirmed the principle of *Sherbert* that invalidates "conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement of the individual to foresake those rights. *Elrod v. Burns*, 427 U.S. at 358 n. 11 (1976).

pose a greater burden on religious exercise than found in *Sherbert*. At stake in *Sherbert* was up to twenty-two weeks of worship, with the loss of benefits reduceable to a monetary sum. At stake here is an irrevocable decision with life-long and life-threatening implications. Many women will be discouraged from conscientious decision or completely precluded from acting in accordance with the tenets of their faith.

To resist the Hyde Amendments' pressure by submitting to illegal abortion or delaying long enough to scrape together the funds for a legal one, poor women are severely taxed, not simply in monetary terms, but more importantly in terms of risk to their health and lives. Denial of funding thus creates a far greater burden on religious exercise than police power regulations that operate not to preclude religious practice but rather make it "more expensive." *See*: *Braunfeld v. Brown*, 366 U.S. 599 (1961).

In the area of the free exercise of religion, the Court has traditionally evidenced particular concern that otherwise unobjectionable governmental action can unduly burden the rights of the poor. *Sherbert v. Verner*; *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944). In *Murdock v. Pennsylvania*, the Court precluded application of a license tax to colporteurs because it restrains in advance the consititutional liberties of press and religion and inevitably tends to suppress their exercise particularly . . . for "all those who do not have a full purse." 310 U.S. 105 at 112. In the context of an essential public assistance program, forcing a woman to choose between foregoing her religious precepts or her entitlement to necessary health care can become a new device for the suppression of

religious liberty. *See: Murdock v. Pennsylvania*, 319 U.S. at 115.

2. The Hyde Amendments Discriminatorily Burden Women For Whom Abortion Is a Decision of Conscience.

The burdening or religious freedom by the excision of funding for medically necessary abortion is aggravated by religious discrimination. Medicaid-eligible women who adhere to the anti-abortion faiths suffer no impediment in the exercise of conscience. Those of the pro-choice persuasion are hindered or precluded, however, in the exercise of their religious and conscientious scruples. The Hyde Amendments have destroyed the Medicaid program's orginally neutral accommodation of religious and conscientious decisions concerning medical care in general and childbearing in particular.

This case thus involves the "constitutionally imposed 'government obligation of neutrality' originating in the Establishment and Freedom of Religion clauses of the First Amendment" distinguished in *Maher*, 432 U.S. 474 n. 8.(quoting *Sherbert v. Verner*, 374 U.S. at 409). Neutrality forbids governmental exclusion of "the members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in original). Even viewing the Hyde Amendment as a neutral, secular restriction, the religious discrimination it effects is subject to constitutional scrutiny. The free exercise clause "prohibits misuse of secular governmental programs 'to impede the observance of one or all religions or to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect.' *Braunfeld v. Brown*, 366 U.S. at 607." *Gillette v. United States*, 401 U.S. at 462 (1971).

Indeed, discriminatory allocations of public benefits or "privileges" are most strictly scrutinized under the First Amendment. This principle was established in the early speech cases involving access to public property. Thus, even before this Court recognized the First Amendment right to use the public parks and streets, it held discriminatory provision of access unconstitutional. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951). The requirement of neutrality is strict where the free exercise of religion is at issue. *See: Walz v. Tax Commission,* 397 U.S. 664 (1970).

Noting that emergency labor laws exempted those who were "conscientiously opposed to Sunday work," *Sherbert* found the "unconstitutionality of the disqualification . . . compounded by . . . religious discrimination. . . ." 374 U.S. at 406. Likewise, the burden on conscientious decisionmaking is compounded here because the Hyde Amendments destroy the neutrality central to the original statutory scheme and required by the First Amendment. Equal treatment of the woman whose conscience dictates abortion rather than childbirth requires that the riders be invalidated. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).[182]

---

[182] Forty-two states recognize the right to refuse participation in abortion. Alaska Stat. § 18.16.010(a) (Supp. 1979); Ariz. Stat. Ann. § 36-2151 (1974); Ark. Stat. Ann. § 41-2560 (1948, 1977); Cal. Health and Safety Code §§ 25955—25955.3 (West Supp. 1979); Colo. Rev. Stat. § 18-6-104 (1978); Del. Code Ann. tit.24, § 1791 (1975); Ga. Code Ann. § 26-1202(e) (1978); Haw. Rev. Stat. § 453-16(d) (1976); Idaho Code § 18-612 (1979); Ill. Rev. Stat. ch. 91 § 201 (1973); Ill. Ann. Stat. ch. 38, § 81-16, -33 (Smith-Hurd 1977); Iowa Code Ann. § 146.1-.2 (West Supp. 1979); Kan. Stat. §§ 65-443 to -444 (Supp. 1979); Ky. Rev. Stat. ch. 311. 800—.810

C. The Hyde Amendment Must Be Invalidated Because There Is No Substantial Purpose Justifying the Discriminatory Burden On The Abortion Decision.

Whether viewed as a burden on the free exercise of religion or as a violation of religious neutrality, the Hyde Amendments must be subject to strict scrutiny. In *McDaniel v. Paty*, the Court reaffirmed the standard

(1972, 1977); La. Rev. Stat. Ann. tit. 40, §§ 1299.31-.34 (West Supp. 1979); Me. Rev. Stat. Ann. tit. 22, § 1592 (Supp. 1979); Md. Code Ann. art. 43, § 556E (Supp. 1979); Mass. Ann. Laws ch. 112 § 121 (Michie/Law Co-op Supp. 1980); Mich. Comp. Law Ann. §§ 333.20182—.20184 (1978); Minn. Stat. Ann. §§ 145.414, .42, .925 (West Supp. 1979); Mo. Ann. Stat. ch. 197.032 (Vernon Supp. 1980); Mont. Rev. Codes Ann. tit. 94-5-620 (1977); Neb. Rev. Stat. §§ 28-4,156 to 160 (1975); Nev. Rev. Stat. § 632.475 (1977); N.J. Stat. Ann. tit. 2A:65A-1 to 2 (West Supp. 1979); N.M. Stat. Ann. § 30-5-2 (1978); N.Y. Civ. Rights Law § 79-i (McKinney 1976); N.C. Gen. Stat. § 14-45.1(f) (Supp. 1979); N.D. Cent. Code § 14-02.1-03(3) (Supp. 1979); Ohio Rev. Code Ann. § 4731.91 (Page 1977); Okla. Stat. Ann. tit. 63, § 1-741 (West Supp. 1979); Or. Rev. Stat. § 435.485 (1977); Pa. Cons. Stat. Ann. tit. 43 § 955.2 (Purdon Supp. 1979); R.I. Gen. Laws § 23-17-11 (1979); S.C. Code § 44-41-50 (1976); S.D. Cod. Laws § 34-23A-12 to -14 (1977); Tenn. Code Ann. § 39-304 to -305 (1975); Rev. Tex. Civil Stat. Ann. art 4512.7 (Vernon Supp. 1979); Utah Code Ann. § 76-7-306 (1978); Va. Code § 18.2-75 (1975); Wash. Rev. Code Ann. § 9.020.080 (1977); Wisc. Stat. Ann. § 140.42 (West 1974); and Wyo. Stat. Ann. § 35-6-106.

Federal law precludes conditioning the receipt of federal funds on the provision of abortion services. 42 U.S.C. §§ 300a-7-8, and several cases have recognized a right in private hospitals to refuse them. *Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Cf.*: *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (4th Cir. 1975) *cert. denied*, 424 U.S. 948 (1976) (denominational hospital may refuse sterilization). In the Title VII context, the I.R.S. was required to accommodate an employee whose conscience precluded him from carrying out work which would result in the provision of abortion services. *Haring v. Blumenthal*, 471. F.2d 1172 (D.D.C. 1979).

of review applied in *Sherbert* and *Yoder* that disqualifications or penalties based on religiously grounded conduct can be sustained "only [by] those interests of the highest order and those not otherwise served." 435 U.S. at 628. Furthermore, the state interests in regulation must be based upon "some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403; *see, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The court below correctly applied these standards in invalidating the Hyde Amendment's withdrawal of abortion funding from the Medicaid program.

Here there is no interest,[183] let alone one of paramount importance, which overrides plaintiffs-appellees' free exercise claim, *see Yoder v. Wisconsin*; *compare Gillette v. Unites States*, since they seek only to have reimbursement to do an act which, like worship in *Sherbert*, is completely legal and constitutionally protected.

While bare legislative desire to deter the exercise of a fundamental right is not legitimate in any context, *supra*, Section II-E, it is doubly impermissible in the context of the First Amendment. This Court has repeatedly made clear that mere disapproval of the content of conscientious exercise is an impermissible basis for restraint. *See, e.g., Fowler v. Rhode Island,* 345

[183] Supra, pp. 128-136. In particular, the lower court found "There is no national commitment to unwanted children. Existing law encourages family planning, it does not foster unwanted pregnancy and unwanted childbirth. That is very particularly true with respect to teenage women, and, especially, women seventeen years of age and under." Slip op. at 166.

U.S. at 69-70; *Niemotko v. Maryland*, 340 U.S. at 272-73; *Murdock v. Pennsylvnia*, 319 U.S. at 116. That the riders are predicated on a moral valuation of fetal life not as potential but as actual human life is clear. Slip op. at 21. Even if this were not a religious judgment, *infra* Section VII, it is one which this Court correctly viewed as beyond the competence of the state in *Roe v. Wade*, 410 U.S. at 162. Moreover, under the Free Exercise Clause, the state cannot restrict abortion simply because it prefers the moral valuation of fetal and existing human life shared by the anti-choice forces to that held by those who consider abortion, in certain circumstances, to be a moral necessity or an affirmative act of faith. To be legitimate, the legislative purpose must serve some important and concrete public interest independent of disapprobation of the conscientious position. *See e.g., Gillette v. United States,* 401 U.S. at 437.[184]

[184] Describing the taxpayer's interest in withdrawing funding for abortion as "conscientious" adds no weight to the state interest asserted. Taxpayers have no First Amendment right to withhold tax payments because of deeply held religious or moral opposition: "The fact that some persons may object on religious grounds to some of the things that the Government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax." *Autenreith v. Gullen*, 418 F.2d 586, 588 (9th Cir.), *cert. denied* 397 U.S. 1036 (1969). Indeed, even the Roman Catholic Church does not claim a free exercise right to withhold taxes for abortion, *supra* p. 71. Although Congress is not without power to legislate based on conscientious convictions that are widely shared, the district court properly recognized that a difference of opinion on a matter of conscience cannot override the conscientious claim of the individual whose practice is directly affected. Slip op. at 328. Thus, the attenuated claim of the taxpayer cannot outweigh the claim of indigent pregnant women to necessary medical services in accordance with their religiously-based conscientious decision. *Compare, e.g., United States v. Seeger*, 380 U.S. 163.

The riders serve no such interest. They are directed not to conduct within the regulatory power of the state, but rather to the suppression of dissident belief. As an effort to coerce conformity to the anti-abortion viewpoint, the riders are beyond the power of the state. As the Court recognized in *West Virginia State Board of Education v. Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime and *particular plans for saving souls*. . . . Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> . . . .
>
> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or *force citizens to confess by word or act their faith therein.*

319 U.S. 624, 641-42 (emphasis added).

Judge Dooling simply restated the teachings of *Barnette* and *Roe v. Wade* when he wrote that "the

irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious non-participation." Slip op. at 328.

For all these reasons, the Hyde Amendments must be invalidated as an impermissible and discriminatory interference with the religious and conscientious rights of poor women.

VII.

THE HYDE AMENDMENTS VIOLATE THE FIRST AMENDMENT'S PROHIBITION ON LAWS RESPECTING AN ESTABLISHMENT OF RELIGION.

The undisputed purpose of the Hyde Amendments is to restrict abortion as much as possible, on the belief that abortion, at any stage of gestation, is taking human life, tantamount to murder.

The Hyde Amendments have no preamble stating that they are designed to prevent the sin of abortion and bring civil law into conformity with God's law. Nor did the law, invalidated in *Epperson v. Arkansas*, 393 U.S. 97 (1969), prohibiting the teaching of evolution in the public school, explicitly state its religious purpose. Here, as in *Epperson*, this Court must look beyond the face of the statute. *Id.* at 108-09. The legislative history of the Hyde Amendments and their historical and social context make unmistakeable their religiosity.

This case is heir to *Epperson* in several respects. There, in response to attempts to liberalize the school

curriculum, "Scopes" laws were enacted withdrawing from the curriculum one subject abhorrent to a powerful religious constituency. Here, in response to the liberalization of abortion laws, the Hyde Amendments have been enacted withdrawing, from a broad medical assistance program, one medical service abhorrent to a powerful religious minority.

As in *Epperson*, the Hyde Amendments enact a distinctly religious belief in response to intense pressure from a religiously based and motivated constituency. The riders likewise reflect distinctively regious fervor. The fundamentalist movement behind the "Scopes" laws viewed its enemies as "blasphemers" and "anti-Christian."[185] Today, the so-called "right-to-life" movement views supporters of the abortion right as "murderers" and "anti-Christians." Religious mobilization and epithet unquestionably enjoy the full protection of the First Amendment. Here, however, as in *Epperson*, they must be examined as indicators of the impermissibly religious nature of the resulting legislation.

There is one important difference from *Epperson*. By the time *Epperson* was decided, the religious mobilization and fervor that had brought the "Scopes" law into existence had long since subsided.[186] The law had become a relic and the political tensions which arise whenever the religion clauses are in issue had been alleviated. By contrast, the growing divisiveness over the abortion issue is presently tearing this country

[185] *Epperson*, 393 U.S. at 107-08 n. 15,16.

[186] What had been viewed as non-sectarian in 1928 was recognized as sectarian 40 years later. Compare *Epperson* with *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

apart and "strains. . . [the] political system to the breaking point." *Walz v. Tax Commission of the City of New York*, 379 U.S. 664, 694 (1970) (Harlan, J. concurring).

This Court has formulated a tripartite test to determine whether or not a law establishes religion: "to pass muster under the Establishment Clause the law in question first must reflect a clearly secular purpose . . . second . . . have a primary effect that neither advances not inhibits religion . . . and third . . . avoid excessive government entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973). Although the district court's extensive findings of fact fully substantiate the Establishment Clause claim, *see* Facts, *supra,* §§9, 10, 11, 12, the court failed properly to apply the principles settled in this Court. Application of these criteria to the Hyde Amendments dictate their invalidation under the First Amendment.

A. The Hyde Amendments Have No Clear Secular Purpose.

In Establishment Clause analysis, the Court deals with the actual purpose of legislation, not with hypothetical ones.[187] Given the inevitable, subtle and sometimes dangerous intertwining of secular and religious considerations, the operative purpose may not be just arguably secular; it must be clearly so.[188]

---

[187] *See: School District of Abington v. Schempp*, 374 U.S. 203, 222-23 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968); *McGowan v. Maryland*, 366 U.S. 420, 431-45 (1961); *McDaniel v. Paty*, 435 U.S. 618, n. 9. (Brennan, J. concurring).

[188] See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 7 (1947); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 672 (1970) (Brennan, J., concurring). In most cases, the secular purpose was specifically set forth in legislative findings or in a preamble to the statute. *See*, e.g., *Board of Education v. Allen*, 392 U.S. 236, 239 n. 2 (1968); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 607, 609 (1971); *Committee* for Public Education v. Nyquist, 413 U.S. 756, 763-66 (1973); *Meek v. Pittenger*, 421 U.S. 349, 352 n. 2 (1975); *Wolman v. Walter*, 433 U.S. 229 n. 5 (1977).

Where, as in the parochial school aid context, religious and secular purposes can easily be distinguished analytically, this Court's concern is to assure that they can be disentangled in practice. This case, however, presents a threshold question of whether legislation that promotes the belief that the human fetus is a human life is impermissibly religious.[189] Whether a particular belief is religious requires consideration of empirical fact in light of the purpose of the First Amendment. The question here is, therefore, whether the belief that a fetus is human life is, in the historical and social context of our time, religious in character, and whether enactment of this belief in the form of the Hyde Amendment threatens intolerance, oppression and sectarian divisiveness against which the Establishment Clause stands guard.

The decisions of this Court instruct that the determination whether a given belief is impermissibly religious requires consideration of a number of factors. These are whether the belief is presently rooted in distinctively religious teaching, whether it is nonetheless a belief which is widely shared, whether the con-

---

[189] There is no question that a law which sponsors, advances or imposes religion violates the Establishment Clause every bit as much as one which provides material assistance to religious institutions. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School District of Abington v. Schempp* 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961)

stituency and advocacy for the law are identifiably religious in character or reflect distinct secular concerns, and whether institutional religion plays a predominant role in the effort to enact the particular belief into law. No single factor makes a law impermissibly religious.[190] *Epperson v. Arkansas*, 393 U.S. at 97; *School District of Abington v. Schempp*, 374 U.S. at 203; *Engel v. Vitale*, 370 U.S. at 431; *McGowan v. Maryland*, 366 U.S. at 420.

The district court found that the Hyde Amendments were enacted to prevent as many abortions as possible. They seek to implement the belief that actual, full and inviolable human life begins at conception. Slip op. at 273-74.[191] This belief is distinctly religious in our society. The riders' proponents contend, however, that the belief that human life begins at conception reflects secular as well as religious morality. Slip op. at 32.

---

[190] In particular, although the dominance of institutional religion in the effort to enact a particular law is a relevant factor in Establishment Clause analysis, it is never alone sufficient to render a law impermissible.

[191] There is no contention here that the Hyde Amendments were enacted to advance distinctly secular concerns to encourage normal childbirth, or protect potential human life. No one even argued that the riders would save money. Indeed, fiscal conservatism was abandoned where legislators saw "human life" at stake. Similarly, no one seriously argued that the riders served any health interest. Indeed, organizations and programs concerned about maternal and child health opposed the abortion riders. For example, the statements from the American Medical Association and the American College of Obstretricians and Gynecologists are reported at Cong. Rec. S13671 (8/4/77). Recommendations of the American Academy of Child Psychology Pl. Exh. 169; A. 286; HEW, Initiative to Address Adolescent Pregnancy and Related Issues (Schuck Report), Pl. Exh. 244, (*See* Facts, *supra*, § 5f.)

It is clear that the view that abortion is tantamount to murder is "rooted firmly . . . in belief in God's will, in God as the author of life and in God's concern with humankind." Slip op. at 239. It is, as the district court found, "beside the point that reasonable men, without any knowledge of God or of his existence, would evolve the same principles by right reasoning alone" because "the moral principle, once determined by right reasoning is recognized as the will of God." Slip op. at 239-40. Scientific evidence is seen merely to confirm, not establish, the belief that the fetus is a human life from conception. Thus, the obligation to oppose abortion, despite reference to rational analysis or biological learning, is "seen nonetheless as religiously imposed." Slip op. at 229; *see* also, slip op. at 175-78.

Because they enact the belief that the fetus is an actual human life from conception, the Hyde Amendments are "beyond legitimate legislative concern." They intrude into "the specific but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea . . ." *McGowan v. Maryland*, 366 U.S. at 466 (1961) (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. at 244-45 (Brennan, J., concurring); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the state for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." *Wolman v. Walter*, 433 U.S. at 264 (Stevens, J. concurring and dissenting, quoting Clarence Darrow, Tr. of Oral Arg. at 7, *Scopes v. State*.

The "Scopes" law struck down in *Epperson* enacted a preference for the theory of divine creation of the world; the Hyde Amendments, premised on belief that human life begins at fertilization, are likewise based on a particular religious view of the divine creation of humanity.

The fact that a rule of law coincides with a religious tenet does not alone render it impermissible. When originally religious values are widely accepted by social consensus and where they serve the ends of civil governance (such as injunctions against murder or the benefits of a day of rest) they become a part of the secular fabric of society. *School District of Abington v. Schempp*, 374 U.S. at 264 (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. at 445.

In *McGowan v. Maryland*, the Court upheld Sunday closing laws because they no longer reflected their originally religious purpose and had accrued independent *secular* purposes and a clearly independent secular constituency over time. The opinions recognize that society's contemporary concern with the physical and mental well-being of the workforce made a day off mandatory and that the predominant secular support for the law emphasized the importance of a universal day of rest to permit families to be together. 366 U.S. at 431-35, 470-505 (Frankfurter, J., concurring). Thus, the laws reflected a "widely felt present day need" and a "tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure." *Id.* at 497, 504.

In *McGowan*, however, history revealed the secularization of the originally religious laws. Here, the con-

verse is true. Laws restricting abortion which historically served a panoply of secular concerns,[192] are today the product of a single, religious concern for the life of the fetus.

The belief in fetal personhood is primarily and overwhelmingly identified with one segment of religious teaching[193] and is emphatically rejected by the major Jewish and Protestant denominations "in the mainstream of the country's religious beliefs." Slip op. at 327. This division among religious faiths, on a matter which is so rooted in religious concepts, deprives the law of any claim to a secular, moral concern such as underlies the universally shared condemnation of murder.[194] This division is particularly significant as well because it breeds the sectarian strife which the no-establishment clause is designed to avoid (*infra*, section VII, B, C).

---

[192] *See: Roe v. Wade*, 410 U.S. at 148-50, and sources cited therein. Mr. Justice Blackmun, writing for the Court, identifies three justifications supporting the criminal abortion laws of the nineteenth century: Victorian social concern to discourage illicit sexual conduct; protection of the pregnant women from then extremely hazardous medical procedures; and finally, in a distinctly tertiary role, protection of "prenatal life." *See also:* Mohr, *Abortion in America*, (1978); Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (1976).

[193] *See e.g.*, school aid cases where the Court looked to the degree to which a particular law provided benefits primarily to religious schools rather than to non-sectarian private schools. *Committee for Public Education v. Nyquist. See, Walz v. Tax Commission*, 397 U.S. 664, 687-89 (Brennan, J., concurring).

[194] Even if a religious belief is shared by a majority, *e.g.*, *Epperson v. Arkansas*, or a particular practice is popularly viewed as non-sectarian, *Engel v. Vitale*, it can nonetheless be impermissibly religious under the Establishment Clause.

No cacophony of distinct secular institutional voices and concerns is heard in the forces that are pressing the view that the fetus is actual human life from the moment of conception. As the district court found, the anti-abortion churches, most significantly the Roman Catholic Church, are the major and practically exclusive institutional voices supporting these restrictions.

Even where there is substantial support for a law from non-ecclesiastical leaders and institutions, the Court looks to see whether the rationales put forward nonetheless have a significant religious component, even if non-sectarian. *School District of Abington v. Schempp*, 374 U.S. at 203, 270, 271 (Brennan, J., concurring.)[195] *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring).

Here, the absence of clearly secular advocacy in the "right to life" movement for the abortion restrictions is decisive. Its constituency, support and orientation are largely religious and, more importantly, it asserts no independent secular justification for the evils of abortion. Where legislation rooted in sectarian religious beliefs not widely shared is claimed to serve a secular purpose, and is supported in the legislature and in the society at large by a predominantly and pervasively

[195] There the contentions of leading public educators that bible reading would advance "spiritual enlightenment" and the "principles of virtue , morality, patriotism, and good order—love and reverence for God—charity and good will to men" reaffirmed its inherently religious character. *Schempp*, 374 U.S. at 224, 270-71, 279-80 (Brennan, J., concurring). *McGowan* also makes clear that the fact that a religious institution supports a particular law is offset if the reasons put forward by the religious spokespeople are also secular. 366 U.S. at 478, n.28 (Frankfurter, J. concurring).

religious constituency, the claim of secular purpose must fail.[196]

Epperson provides singular guidance. In *Epperson*, the Court had to discover why something was singled out for exclusion from an otherwise unrestricted program. The Court invalidated the statute prohibiting the teaching of evolution because it was "a product of the upsurge of fundamentalist, sectarian conviction" that the theory of evolution "denied the divine creation of man." 393 U.S. at 98, 108. In so doing, the Court noted the intrinsically religious character of public adovcacy for the law.[197]

Here, as in *Epperson*, the law does not fully and perfectly embody the religious teaching.[198] In the

[196] The question here is not to discover the individual motivation of the legislators, but rather the character of the belief in society at large, of which the legislative debates are an important reflection. Thus the concern that motivational analysis based on legislators' statements alone, lacks permanence and reliability in constitutional decisionmaking is not involved here. The statements of legislators cannot be divorced from the character of an issue in its present context. *Compare United States v. O'Brien* 391 U.S. 370 (1968).

[197] *Epperson* noted the following advertisement as typical of the public appeal which was used in the campaign to secure adoption of the statute:

> The Bible or Atheism, Which?
>
> All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of thier children? *The Arkansas Gazette,* Little Rock, November 4, 1928, p. 12, cols. 4-5

393 U.S. at 108, n.16.

[198] The *Epperson* majority noted Clarence Darrow's comment that the statute "did not insist on the fundamentalist theory in all

school prayer cases, the Court also rejected the notion that compromised religion is no religion at all. Thus, in *Engel*, the Court invalidated an opening prayer drafted by the Regents which had been concededly drained of sectarian content. 370 U.S. at 423, 430, 436.

The arguments of the Congressional proponents of the riders and the literature of the "right-to-life" movement, whether they emanate from churches, non-sectarian groups or private individuals, reflect the same fervor and echo the same themes. *See* Facts *supra* § 11. That the Hyde Amendments reflect a compromised version of their goals does not obscure their religiosity.

The district court thus failed to follow the settled instruction of this Court to evaluate a law's purpose in light of present rather than past reality. The district court drew on the past instead of looking to the present, and mistakenly relied on this Court's opinion in *Roe v. Wade* to justify its conclusion that the clear purpose of the Hyde Amendments to prevent abortions is based on "a traditionalist view more . . . than any religious one." Slip op. at 323-24.[199] *Roe v. Wade* prohibits enacting the belief that a human life begins at

respects" but permitted teaching "that the earth is round and the revolution on its axis brings the day and night, in spite of all opposition." 393 U.S. at 102, n. 9.

[199] Laws enacting the anti-abortion view that the fetus is a human life are not insulated from invalidation under the Establishment Clause because they are allied, as the district court felt, with a traditionalist morality. The clear teaching of establishment cases is that even secular moral values cannot be advanced through religious means. *Committee for Public Education v. Nyquist*, 413 U.S. at 783, n. 18, citing *School District of Abington v. Schempp*, 374 U.S. at 278-81 (Brennan, J., concurring).

conception regardless of its religious character. Moreover, *Wade* intimates that the concern for the fetus as an actual human life—which is distinct from an interest in potential life—is too religiously determined to support valid civil enactments. 410 U.S. at 159. The record in this case and the extensive findings of the district court bring the full religious character of this belief to light.

B. The Hyde Amendment Has a Primary Effect of Advancing One Religious Belief and Inhibiting Opposing Religious and Non-Religious Belief and Practice.

Even where a law has a clear and distinct secular purpose, the Court must determine whether or not it has a primary effect that either advances or inhibits religion. As Justice Powell made clear in *Nyquist*, the effect test presents a separate hurdle because "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between church and state." *Committee for Public Education v. Nyquist*, 413 U.S. at 774. The effect test requires invalidation of laws which, though neutral and secular in intent, "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education.*

The inquiry into religious effect has emerged as the strictest aspect of establishment clause analysis. Impermissible effect need not be direct, as the lower court here assumed. Slip op. at 325. A law, neutral on its face, which has the effect of providing substantial support, directly or indirectly, to religion fails the effect test. *Committee for Public Education v. Nyquist*, 413

U.S. at 767-68, 783. In *Nyquist,* Justice Powell rejected the contention that the Court must decide which effect is *the* primary one and which is secondary. It is sufficient that the law has *a* primary effect—rather than an effect which is remote, indirect and incidental—which advantages religion. 413 U.S. at 783 n. 39.

Here, we are dealing with effects which are substantial rather than remote, indirect or incidental. Legislative enactment of a belief that the fetus is human life from the moment of conception substantially advances religion and inhibits the exercise of religious and conscientious liberty. *See* Facts *supra* §§ 9, 11.

On the symbolic level alone, the establishment clause is violated because the Hyde Amendments place the power, prestige and financial support of government behind the view that the fetus is human life. *Engel v. Vitale*, 370 U.S. at 429-30; *School Board of Abington v. Schempp*, 374 U.S. at 261-63, comparing *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 203; *Walz v. Tax Commission*, 379 U.S. at 668. The legislative debates make clear that the proponents of the Hyde Amendment were less concerned with the practical impact of the riders than with affirming the "principle of life." *See* Facts *supra* § 10.

The riders are widely viewed as embodying and sponsoring the religious doctrine of denominations which oppose abortion as murder or homicide. At the same time, they disparage the religious, ethical and moral convictions of those who view the abortion decision as a necessary and appropriate moral choice under circumstances which threaten the survival, health and

fulfillment of existing life. *School District of Abington v. Schempp*, 374 U.S. at 219, citing *Everson*, 330 U.S. at 52.

The unconstitutional impact of the excision of Medicaid reimbursement for abortion is not simply symbolic; the riders seek to prevent poor women from obtaining legal, medically necessary abortions, and they succeed in doing so. By exacting submission to childbearing as the price of retaining their Medicaid entitlement, the riders pressure poor women to forego their convictions and conform their conduct to that segment of religious opinion which condemns abortion.

The impermissibility of the Hyde Amendments does not depend, however, on their efficacy in forcing women to carry pregnancies to term or in barring them altogether from safe, legal abortion. The establishment clause forbids schemes which require people to take special measures to avoid acquiescence in the state-sponsored religious view. *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9. *Engel v. Vitale*, 370 U.S. at 430-31. "The absence of any element of coercion, . . . is irrelevant to questions arising under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. at 786; *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The existence of an excusal provision does not save school prayers from unconstitutionality; it is likewise irrelevant that some members of plaintiffs-appellees' class may succeed in scraping up the fee or finding a free abortion. Not only are such "alternatives" available to but a portion of plaintiffs-appellees' class, but the desperation and health risks suffered as a result of delay itself are every bit as offensive to the First

Amendment as the embarassment or isolation suffered by the school child who must seek exemption from religious exercises. *Engel v. Vitale*, 370 U.S. at 430; *see: Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 227.

Although the establishment clause is violated without "proof that particular religious freedoms are infringed," *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9, here the free exercise rights of indigent women who do not believe that human life begins at fertilization and for whom abortion may be the moral and religiously required choice, are simultaneously violated. The violation of free exercise is *a fortiori* an impermissible inhibition of religion under the effect test.

Our society is divided on religious and conscientious grounds on the question of when human life begins and on the morality of abortion. The effect test enjoins the state from discriminating on religious grounds—preferring one side of the controversy over the other and imposing those beliefs on those who reject their validity in the distribution of necessary health care benefits. *Everson v. Board of Education*; *Torcaso v. Watkins*. The excision of funding for medically necessary abortion under a program of comprehensive service is classic "religious gerrymandering" which cannot survive the neutrality demanded by the Establishment Clause. *Walz v. Tax Commission,* 397 U.S. at 696 (Harlan, J., concurring).

State neutrality on this matter of private conscience is furthermore essential to preserving the public peace. While philosophers, theologians and ethicists might debate the contours of "religious", courts look for their

definitions to those concrete phenomena which threaten the evils the First Amendment was designed to avoid. When an issue is perceived as religious, particularly by opposing religions, state sponsorship sacrifices the reality of neutrality necessary to the preservation of religious harmony and public peace. The danger is heightened when the law, as here, inhibits as well as deprecates a moral decision-making process which is sacred to the dissenting faiths. It is a particularly significant indicator of impermissible religiosity that pro-choice theologians and *amici curiae* unequivocally identify the law as advancing a religious view of abortion. *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 228 n.19.

C. The Riders Compel And Invite Excessive Entanglement Of Government And Religion.

The excessive entanglement test has often been described as preserving the integrity and independence of both religion and government. As Justice Black wrote in *Engel v. Vitale*, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy the government and to degrade religion." 370 U.S. at 431.

Two components of the excessive entanglement test have been recognized by the Court: administrative interference with or surveillance of religious activities; and political entanglement of religious institutions in the government process for sectarian ends. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Hyde Admendments violate the administrative component because they impermissibly entangle the

state in a religious decision-making process. Civil authority is forbidden to set the standards for the abortion decision here just as it may not review doctrinal matters affecting internal religious affairs. *Jones v. Wolf*, ___ U.S. ___, 99S. Ct. 3020 (1979). *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also, United States v. Ballard, 322 U.S. 78, 86* (1944).

The riders also reflect and exacerbate the divisiveness that normally attends religiously based legislation. The political entanglement test is rooted in the framers understanding that the intermeddling of church and state threatens the social fabric.[200] *Everson v. Board of Education*, 330 U.S. at 3-11; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 228, n. 19 (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. 219 (1963). In the school prayer cases, which came to this Court in a

[200] James Madison explained this in his historic Memorial and Remonstrance:

> [I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. . . . If . . . we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of law?

Everson v. Board of Education, 330 U.S. at 69-70.

context nearly as explosive as this one, the Court emphasized that "bitter strife" is the ultimate result of the struggles of "religious groups . . . with one another to obtain the Government's stamp of approval." *Engel v. Vitale,* 370 U.S. at 426-29; *see also, School District of Abington v. Schempp,* 374 U.S. at 230 (Brennan, J., concurring).[201]

In *Lemon v. Kurtzman,* this Court adopted the suggestion of Justice Harlan, concurring in *Walz v. Tax Commission,* 397 U.S. at 695, that a law's potential for political divisiveness along religious lines should be an independent test for excessive entanglement. *See: Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973); *Meek v. Pittenger,* 421 U.S. 349, 372 (1975).

As they were explained by the Chief Justice in *Lemon v. Kurtzman*, the dynamics of divisiveness along religious lines aptly describe the present day effort to restrict abortion funding. Political action to enact the religious belief that the fetus is human life has been spearheaded by religious institutions and a religiously grounded movement, *see* Facts, *supra*, at § 11; heated political opposition on religious, constitutional and other grounds has inevitably resulted; and the issue has assumed single-issue importance such that "[c]andidates . . . [have been] forced to declare and voters to choose . . . and many people confronted with issues of this kind . . . [have found] their votes

[201] In *Schempp*, Justice Brennan, concurring, observed that "deep feelings are aroused when aspects of [the] relationship [between religion and the public schools] are claimed to violate the injunction of the First Amendment . . ." 374 U.S. at 230.

aligned with their faith." *Lemon v. Kurtzman*, 403 U.S. at 622. *See* Facts, *supra*, § 12.[202]

The political divisiveness attending the Hyde Amendments corroborates the religious nature of the "human life" tenet and requires the amendments' invalidation. The dangers of divisiveness may justify a finding of unconstitutionality even when a clear and substantial secular interest can be discerned. As Mr. Justice Powell noted in *Nyquist*, "while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored . . ." 413 U.S. at 797-98. *See: Meek v. Pittenger*, 421 U.S. 349 (1975).

Whether political divisiveness is an independent test or a "warning signal", it is clear that the dangers perceived for both religion and democratic government are far greater here than in the parochial school aid cases. The effort to restrict abortion affects not only Congress but every level of government, every aspect of

[202] *Lemon* also noted that "the need for continuing annual appropriations . . . and the likelihood of larger and larger demands [with] pressures for expanding aid" intensifies divisiveness in the context of parochial school aid. 403 U.S. at 623. The district court erred, however, in regarding the annual nature of appropriations as an essential rather than an additional criterion of political entanglement. Slip op. at 325-26. While it is true, as the lower court notes, that the annual battles attending the Labor-HEW riders would be obviated if a constitutional amendment were adopted, the fact is that, for four years, the issue has been a virtually intractable one and promises no respite. Moreover, that this issue, like the issue of school prayer, might be immunized by a constitutional amendment from scrutiny under the Establishment Clause, does not relieve the present obligation of the Court to invalidate religious enactments.

the political process and every legislative matter which has a direct or tangential impact on the availability of abortion in this country.

Moreover, the dangers of divisiveness are enhanced, first because of the volatility of a movement which invokes divine obligation to oppose abortion as murder, and, second, because the effect of these riders is not simply to aid religious institutions, but to impose the moral view of one segment of the religious community on those whose conscience dictates otherwise. As the district court recognized, the political divisiveness created by the Hyde Amendments signals the need for strict scrutiny where liberty protected by the Fifth Amendment and the rights of conscience, harbored by the First, are at stake. Slip op. at 328.

Though this Court's injunction will not, in one fell swoop, end the destructive fragmentation we are experiencing, it will nonetheless preserve the integrity of our constitutional system, which, by insisting upon a super-majority to amend the Constitution, checks the power of a fervent single-issue minority to victimize the poor.

Indeed, the Court fulfills its highest office in precisely these circumstances when, against the deepest and most fervent of beliefs, it guards the separation of church and state and guarantees the liberty of individual conscience to all.

Conclusion

For the reasons stated, the Hyde Amendments violate the First and Fifth Amendments and the judgment of the lower court should be affirmed.

March, 1980

Respectfully submitted,

RHONDA COPELON
NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

JANET BENSHOOF
JUDITH LEVIN
American Civil Liberties Union
132 West 43 Street
New York, New York 10036
(212) 944-9800

SYLVIA A. LAW
New York University School of Law
40 Washington Square South
New York, New York 10012
(212) 598-7642

Attorneys for Women and Doctor Plaintiffs-Appellees and the Women's Division of the Board of Global Ministries of the United Methodist Church

HARRIET F. PILPEL
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022
(212) 758-4010

EVE W. PAUL
Planned Parenthood Federation of America
810 Seventh Avenue
New York, New York 10019
(212) 541-7800
Attorneys for Plaintiff-Appellee Planned Parenthood of N.Y.C., Inc.

ELLEN K. SAWYER
Corporation Counsel of the City of New York
Municipal Building
New York, New York 10007
(212) 566-2665

Attorneys for Plaintiff-Appellee New York City Health and Hospitals Corporation

Of Counsel:

PATRICIA HENNESSEY
425 Park Avenue
New York, N.Y. 10022
(212) 759-8400

ANNE R. TEICHER
36 Horatio Street
New York, N.Y. 10014
(212) 691-2048

KATHLEEN WHELAN
35 Tanager Lane
Levittown, New York 11756
(516) 796-3238

Appendices

APPENDIX A

For the convenience of the Court, plaintiffs provide this list and brief description of their expert medical and theological witnesses.* Each witness is an acknowledged leader in his field.

The medical witnesses included:

Dr. Morton Bard, a Professor of Psychology at the City University of New York, and a Diplomate of the American Board of Professional Psychology. He is Director of the University's graduate programs in criminal justice and a frequent consultant to police departments. Dr. Bard testified on the impact on women of having to carry to term a pregnancy which resulted from rape.

Dr. Judith Belsky, the Psychiatric Consultant to the Department of Obstetrics and Gynecology at Bellevue Hospital since 1969. Most of her work has been with Medicaid-eligible patients. (T. 3518.) Dr. Belsky testified about abortion practice at Bellevue and New York University Hospital before the liberalization of abortion laws and her own rigorous, detailed, unpublished, statistical study based on experiences interviewing several hundred women referred for psychiatric evalua-

---

* Plaintiffs do not list here approximately twenty other witnesses. This group included: senior state Medicaid officials, who testified on the difficulties of implementing the Hyde standards because of the uncertain language; welfare recipients; and the founder and executive director of a national organization of abortion providers, who testified on the economics of providing quality abortion services and the minimal existing and projected existence of free or reduced fee abortions.

tion and presentation to Bellevue's Abortion Committee.

Dr. David Bingham, Director of the Planned Parenthood out-patient abortion clinic in Norwich, Connecticut and a practicing obstetrician and gynecologist. A Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists, he served on the faculty of Yale Medical School from 1972-74. Dr. Bingham testified about the practice of obstetrics and gynecology under restrictive abortion laws, including the discriminatory enforcement of legal standards and the tragic results of self-induced abortion. He described the difficulties of practicing medicine under the Hyde Amendment.

Dr. Johan W. Eliot, Professor of Population Planning in the School of Public Health at the University of Michigan. He was also the Medical Director of Washtenaw County League for Planned Parenthood in Ann Arbor which performs 2500 abortions a year; Dr. Eliot personally performed one-third of those. (T. 387.) A graduate of Harvard University's Medical School, Dr. Eliot trained in pediatrics at Boston Children's Hospital and the Mayo Clinic. He is board certified in two specialties—pediatrics and preventive medicine, with a subspecialty in maternal and child health. (T. 387.) Dr. Eliot testified on the difficulties the Hyde Amendment creates by denying reimbursement for medically necessary abortions.

Dr. Jane Hodgson, who has practiced obstetrics and gynecology for 30 years and now holds a full-time position at the University of Minnesota Medical School. She is the Director of the Fertility Control

Clinic at St. Paul Ramsey Hospital where abortions and sterilizations are performed. Dr. Hodgson testified on the medical problems created or aggravated by unwanted pregnancies and on the difficulties of applying the Hyde Amendment standards to those conditions.

Dr. Adele Hofmann, Director of the Adolescent Medical Units and Associate Professor of Clinical Pediatrics at the New York University School of Medicine. She is a former President of the Society of Adolescent Medicine. In a program she developed, Dr. Hofmann supervises the health care of the 300 teenagers seen weekly at Bellevue and University Hospitals, including evaluation of teenage pregnancies. Dr. Hofmann has written extensively on biomedical ethics, confidentiality and privacy in adolescent medicine, including a chapter in a standard pediatrics text. (T. 1312-1318, 1335; Pl. Exh. 20, Approaches to Adolescent Health Care in the 1970's.) Dr. Hofmann testified about the problems of treating pregnant adolescents, the special health risks of childbearing for teenagers, and the dangers to emotional and social development. She explained the problems of interpreting the Hyde Amendment standard in providing proper health care to pregnant adolescents.

Dr. Seymour Romney, who chaired the Albert Einstein Medical School's Department of Obstetrics and Gynecology for 15 years and directed those departments at Bronx Municipal Hospital and Albert Einstein Hospital. In 1972 he stepped down from the chairmanship to concentrate on cancer research; he is now the Chief of the Division of Oncology. He has authored numerous scholarly articles on problems of maternal health and pregnancy. He is the Chief Editor of a

current text on obstetrics and gynecology. (T. 1045-53, 1109.) As a teacher responsible for running a large ob/gyn service, he has supervised the performance of a large number of abortions. (T. 1171.) Dr. Romney testified on two occasions. His first testimony covered the meaning of "medical necessity", "life-endangerment", and "life-saving" to doctors in the context of pregnancy, particularly pregnancy for poor women. He testified a second time on the 1978 "severe and long-lasting physical health damage" standard of the 1978 Hyde Amendment as well as on the rape and incest requirements.

Dr. Edmund O. Rothschild, who testified in his capacity as Senior Vice President of New York City's Health and Hospital Corporation, which is charged with responsibility for providing health care services to the residents of New York City. The most senior physician on the Health and Hospital Corporation's staff, Dr. Rothschild's duties include monitoring the quality of professional medical services in the City's municipal hospital system and overseeing the Corporation's contracts with medical schools and voluntary hospitals. (T. 677, 681.) He is a board-certified specialist in internal medicine, a fellow of the American College of Physicians, and the author of 16 articles. Dr. Rothschild testified on the difficulties Health and Hospital Corporation doctors would have interpreting the Hyde Amendment standard and the effects enforcement of the Hyde Amendment would have on the health of women and on the municipal hospital system.

Dr. Richard Sarles, Associate Professor of Psychiatry and Pediatrics at the University of Maryland School of Medicine. Dr. Sarles directs a child psychia-

try pediatric clinic in Baltimore and has published scholarly works in both child psychiatry and pediatrics. (T. 3736-37.) He is an expert on incest and has published an article and a chapter in a major pediatrics text on incest. (T. 3737-38.) Dr. Sarles testified on the impact of a pregnancy resulting from incest, the necessity for the option of abortion and the difficulties created by the Hyde Amendment's prompt reporting requirement.

Dr. Don Sloan, a practicing physician and an Assistant Clinical Professor of Obstetrics and Gynecology at New York Medical College where he is also Director of the Psychosomatic Clinic. (T. 1628-30.) He testified on the effects of the stress of an unwanted pregnancy on the physical course of a pregnancy.

Dr. Christopher Tietze, one the world's preeminent authorities on human fertility and its control. Since 1956, Dr. Tietze has been on the staff of the Population Council. He and his colleagues at the Council did the basic work developing methods of statistical analysis on the effectiveness, safety, and acceptability of various methods of birth control. Dr. Tietze has written or supervised the writing of over 200 scholarly papers, mostly in the field of human reproduction. Sixty of those papers are on abortion. (Pl. Exh. 9.) Prominent among his publications is *Induced Abortion: 1975 Factbook, 1977 Supplement*. Dr. Tietze testified on studies of therapeutic abortions he and others did prior to the reform of abortion laws. These studies document the different interpretations of the life-preserving standard widely used at that time and the resulting discriminatory distribution of abortion services. (Pl. Exh. 10, 11, Studies in Family Planning, "Therapeutic Abortions in

New York City" (1965-67); Studies in Family Planning, "Therapeutic Abortions in U.S.A." (1963-68). Dr. Tietze also testified on studies done in other countries on the effect of different abortion policies and laws on behavior, morbidity, and mortality rates.

Frederick S. Jaffe, now deceased, founder and former President of the Alan Guttmacher Institute, a major research and policy analysis organization in the field of fertility control. Mr. Jaffe wrote and worked with medical and social scientists on problems of controlling human reproduction for 23 years. He had published over 40 articles in professional and scholarly journals and co-authored two major books on human reproduction and public policy. (T. 1508-1517, 1579-1580.) Mr. Jaffe testified on the lack of charitable resources nationwide to provide abortions for poor women who are denied publicly-funded abortions. He also reported on Medicaid reimbursement in states which had restricted their Medicaid reimbursement policies in response to the Hyde Amendment, pointing out the dramatic decline in the number of funded abortions in those states.

The theological witnesses included:

Rabbi David Feldman, ordained as both an Orthodox and Conservative Rabbi, serves the Bay Ridge Jewish Center Congregation in Brooklyn. He serves on the Law Committee and the Steering Committee of the Rabbinical Assembly and is Co-Chair of the Medical Ethics Commission of the Jewish Federation of New York. (T. 1854.) Rabbi Feldman testified as to the theological position on abortion in Jewish law in conservative and reform teachings.

Dr. Gillian Lindt, Professor of Sociology of Religion and Chairperson of the Department of Religion in the Graduate Faculty at Columbia University. (T. 4084.) Her major work and teaching is in the history of sociological thought and in public opinion formation. (T. 4199-4200.) She had never done any work on the abortion issue prior to preparing to testify in this case. (T. 4090; Pl. Exh. 170, *curriculum vitae*.) Dr. Lindt testified on the pervasively religious purpose and motivation of the Hyde Amendment as illustrated by the language of the legislative debates.

Dean John Philip Wogaman, the Dean and Professor of Christian Social Ethics at the Wesley Theological Seminary, a United Methodist Seminary with an ecumenical orientation. (T. 1952.) He is the immediate past President of the American Society of Christian Ethics, the major North American academy society of teachers and scholars of Christian ethics, both Catholic and Protestant. (T. 1953a.) He has a Bachelor of Sacred Theology and a Ph.D. in Social Ethics from Boston University. He is an ordained Methodist minister, has served as a pastor, missionary, teacher and scholar. He serves on a number of ecumenical and denominational boards and has written many books, including *Christian Method of Moral Judgment* (1978); *Population Crisis and Moral Responsibility* (1972) (editor); and *Protestant Faith and Religious Liberty* (1967), as well as a pamphlet entitled, "Abortion: Shall We Return To Absolutism?" Dr. Wogaman described the religious teachings of mainstream Protestant Christian ethics on abortion.

Rev. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs. He holds de-

grees from Carson-Newman College (B.A.), Columbia University (M.A., Comparative Religion and Anthropology) and a Ph.D. in Divinity from Southern Baptist Theological Seminary. He has taught history of religions for 22 years, both in Japan and at Baylor University where he chaired an Interdepartmental Graduate Degree Program in Church-State studies and is founding editor of the Journal of Church and State. He has written several books and over 50 articles on Church-State relations, including an article in 1973 on *Roe v. Wade*. He holds a number of positions in ecumenical groups particularly concerned with religious liberty. (T. 3174-3177; Pl. Exh. 129, *curriculum vitae*.) Rev. Wood explained the Baptist position respecting abortion.

APPENDIX B

FEDERAL STATUTES

The relevant sections of the Social Security Act, 42 U.S.C. 1396 *et seq.* are fully set forth in Brief of Appellees, Appendix B, *Williams v. Zbaraz*. An additional section of 42 U.S.C. is set forth below.

42 U.S.C. § 1396f

Observance of religious beliefs

Nothing in this subchapter shall be construed to require any State which has a plan approved under this subchapter to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parent or guardian objects) thereto on religious grounds.

APPENDIX C

FEDERAL REGULATIONS

I. Regulations Implementing the Hyde Amendment issued July 21, 1978 (43 Fed. Reg. 31868, 3178-79).

C.F.R. § 441.202 *General Rule.*

FFP is not available in expenditures for an abortion except under circumstances described in §§ 441.203 through 441.205.

C.F.R. § 441.203 *Life of the mother would be endangered.*

FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.

C.F.R. § 441.204 *Severe and long-lasting damage to physical health.*

(a) FFP is available in expenditures for an abortion when two physicians have found, and certified in writing to the medicaid agency, that on the basis of their professional judgment, severe and long lasting physical damage to the mother would result if the pregnancy were carried to term. The certification must contain the name and address of the patient.

(b) At least one of the two physicians must also certify that he is not an interested physician, as defined in paragraph (c) of this section.

(c) For purposes of paragraph (b) of this section, an "interested physician" is a physician—

(1) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion; or

(2) Who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

C.F.R. § 441.205 *Rape and incest.*

(a) FFP is available in expenditures for medical procedures performed upon a victim of rape or incest if the medicaid agency has received signed documentation from a law enforcement agency or public health service stating—

(1) That the recipient upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest;

(2) The date of the incident;

(3) The date of the report, which must be within 60 days of the incident;

(4) The name and address of the victim;

(5) The name and address of the individual who reported the rape or incest, if different from the victim; and

(6) That the report included the signature of the individual who reported the incident.

(b) FFP is also available in expenditures for abortions for victims of rape or incest under the circumstances described in §§ 441.203 and 441.204 without regard to the requirements of this section.

§ 441.206 *Documentation needed by the medicaid-agency.*

FFP is not available in any expenditures for abortions or other medical procedures otherwise provided for under §§ 441.203 through 441.205 if the medicaid agency has paid without first having received the certifications and documentation specified in those sections.

§ 441.207 *Drugs and devices and termination of ectopic pregnancies.*

FFP is available in expenditures for drugs or devices to prevent implantation of the fertilized ovum and for medical procedures necessary for the termination of an ectopic pregnancy.

§ 441.208 *Recordkeeping requirements.*

Medicaid agencies must maintain copies of the certifications and documentation specified in §§ 441.203 through 441.205 for 3 years under the recordkeeping requirements at 45 CFR 74.20.

II. Regulations implementing the Hyde Amendment issued January 26, 1978 (43 Fed. Reg. 4570, 4581).

42 C.F.R. § 449.104 *Severe and long-lasting damage to physical health.*

Federal financial participation is available in expenditures for an abortion when two physicians have found, and so certified in writing to the applicable State agency, that on the basis of their professional judgment, severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

42 C.F.R. § 449.105 *Rape and incest.*

Federal financial participation is available in expenditures for medical procedures performed upon a victim of rape or incest if the State agency has received signed documentation from a law enforcement agency or public health service stating that: (a) The person upon whom the medical procedure was performed was reported, within 60 days of the incident, to have been the victim of an incident of rape or incest; and (b) the report included the name, address and signature of the person who reported the rape or incest. Federal financial participation is also available in expenditures for abortions for victims of rape or incest under the circumstances described in §§ 449.103 and 449.104 without regard to the requirements of the preceeding sentence.

Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1268

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,

Appellant,

vs.

CORA McRAE, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSE A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

GERALD E. BODELL
150 E. 35th Street
New York, NY

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
Americans United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, Il 60601
312/263-5386

Attorneys for James L. Buckley, Jesse A. Helms, Henry J. Hyde and Isabella M. Pernicone

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Table of Authorities iv

Questions Presented 1

Summary of the Argument 2

Argument 7

I. Introduction 7

II. An Affirmance Of The District Court's Decision Will In Practical Effect Overrule This Court's Recent Decisions In Maher v. Roe And Poelker v. Doe 15

A. In Effect, the District Court Ordered the Government to Pay for All Abortions, Including Elective Ones, Which a Physician Is Willing to Perform on a Medicaid-Eligible Woman 15

B. The District Court Improperly Distinguished Maher and Poelker By Distorting the Meanings of "Therapeutic" and "Non-therapeutic" 18

III. The Hyde Amendment Was Enacted Under The Appropriation Power Which The Constitution Vests Exclusively In The Congress 20

A. The District Court's Order Infringes Upon The Appropriations Authority of Congress 21

B. The Hyde Amendment Raises a "Political Question" Which the Judiciary Should Not Review 29

PAGE

IV. The Hyde Amendment Is Constitutional 33

A. The Hyde Amendment Burdens No Fundamental Constitutional Right 33

1. There Is No Due Process Right to Any Governmentally Subsidized Abortion .. 33

2. The Hyde Amendment Neither Penalizes the Due Process Right to Privacy Nor Creates an Unconstitutional Condition on Its Exercise 38

3. No Due Process Right to Funded Abortion Is Created by the Medicaid System 43

4. The Hyde Amendment Does Not Inhibit the Free Exercise of Religion 49

5. Summary: The Hyde Amendment Does Not Burden the Exercise of Any Fundamental Right 53

B. Equal Protection of Law Is Not Denied by the Amendment 54

1. The Hyde Amendment Discriminates Against No Suspect Classes 54

2. The Hyde Amendment Is Rationally Related to the Valid State Interest in the Protection of the Fetus 56

V. Limitation Of Abortion Funding Is Valid Under Title XIX 65

A. This Court's Holding in Beal that States May Specify What They Will Fund in Their Medicaid Plans So Long as Such Specifications Are Reasonable and Consistent With the Objectives of the Act Was and Is Correct 67

PAGE

1. No Requirement to Fund "Medically Necessary" Services Is Expressed in the Act 68

2. The Statute Requires that "Part," But Not All, of the Services in Each Mandated Category Be Funded 72

3. The General Provisions of the Social Security Act and the Professional Standards Review Organization Sections Support a Construction of the Title Which Accords Discretion to the States Concerning Coverage Determinations 76

4. The Implementing Regulation Legitimizes A State Choice to Limit Funding of Abortions 84

B. The Standards Established by the Hyde Amendment Are Reasonable and Consistent with the Objectives of the Act 88

1. The State's Interest in Fetal Life Is Consistent with the Objectives of the Act 88

2. The Abortion Funding Limitations Are Reasonable 91

C. Abortion Is Unique in a Manner which Permits Special Funding Limits with Regard to it 94

Conclusion 105

Table of Authorities

PAGE

U.S. Const. art. 1, §8, cl. 1 10

U.S. Const. art. 1, §9, cl. 7 ..... 3, 21, 23, 31

U.S. Const. Amend. 1 (1791) 10

U.S. Const. Amend. XIII (1865) 10

U.S. Const. Amend. XIV (1868) 10

U.S. Const. Amend. XV (1870) 10

U.S. Const. Amend. XIX (1920) 10, 29

U.S. Const. Amend. XXIII (1961) 10

U.S. Const. Amend. XXIV (1964) 10

U.S. Const. Amend. XXVI (1971) 10

Cases

Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F.Supp. 1172 (N.D. Ohio 1979) 53

American Assn. of Physicians and Surgeons v. Weinberger, 395 F.Supp. 125 (N.D. Ill. 1975) *aff'd*, 423 U.S. 915 (1976) 81

Austin v. United States, 155 U.S. 417 (1894) 24

Andrus v. Allard, 100 S.Ct. 318, 325 (1979) 103

Baird v. Bellotti, 99 S. Ct. 3035 (1979) 11

Baker v. Carr, 367 U.S. 186 (1962) 3, 30, 31

Beal v. Doe, 432 U.S. 438 (1977) 2, 6, 18, 29, 67, 74, 77, 83, 87, 88,94, 97, 98, 101

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 4, 46

Baker v. Carr, 369 U.S. 186 (1962) 3, 30, 31

PAGE

Baird v. Bellotti, 99 S.Ct. 3035 (1979) 11

Boddie v. Connecticut, 401 U.S. 371 (1971) 47

Boys Markets, Inc. v. Retail Clerk's Union Local 770, 398 U.S. 235 (1970) 76

Brown v. Louisiana, 383 U.S. 131 (1966) 47

Budnicki v. Beal, 450 F.Supp. 546 (1978) 93

Burns v. Alcala, 420 U.S. 575 (1975) 97, 100

Califano v. Westcott, 99 S. Ct. 2655 (1979) 27, 28

Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937) 23

Colautti v. Franklin, 439 U.S. 379 (1979) 11, 34

Committee for Public Education v. Nyquist, 413 U.S. 756 (1972) 52

Commonwealth v. Brunell, 341 Mass. 675, 171 N.E.2d 850 (1961) 97

Dandridge v. Williams, 397 U.S. 471 (1970) 4, 11, 33, 37, 39, 62, 72

Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975) 101

Doe v. Bolton, 410 U.S. 179 (1973) 2, 15, 19, 100

Doe v. Mathews, 420 F.Supp. 865 (D.N.J. 1976) 3, 22, 23, 26, 27

Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) 97

D.R. v. Mitchell, 456 F.Supp. 609 (D.Utah 1978) 89

Eisenstadt v. Baird, 405 U.S. 438 (1972) 11

Espinoza v. Farah Mfg., 414 U.S. 86 (1973) 86

FAA Administrator v. Robertson, 422 U.S. 255 (1975) 77

Federal Maritime Bd. v. Isbrandten Co., 356 U.S. 481 (1958) 85

PAGE

Ferguson v. Skrupa, 372 U.S. 726 (1963) 60

Five Per Cent Cases, 110 U.S. 471 (1884) 85

Geduldig v. Aiello, 417 U.S. 484 (1974) 4, 35, 42, 61

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 95

Gillette v. United States, 401 U.S. 437 (1971) 51

Goldberg v. Kelly, 397 U.S. 254 (1970) 4, 37, 43, 44

Goss v. Lopez, 419 U.S. 565 (1975) 44

Griswold v. Connecticut, 381 U.S. 479 (1965) 8, 11, 48

Hague v. C.I.O., 307 U.S. 496 (1939) 47

Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) 23

Hart v. United States, 118 U.S. 62 (1868) 24

Helvering v. Davis, 301 U.S. 619 (1937) 11

Idaho Dept. of Employment v. Smith, 424 U.S. 100 (1977) 65

Jamison v. Texas, 318 U.S. 413 (1943) 47

Johnson v. Robison, 415 U.S. 361 (1974) 54

Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet) 524 (1838) 32

King v. Smith, 392 U.S. 309 (1968) 23

Knote v. United States, 95 U.S. 149 (1877) 3, 24

Kokoszka v. Belford, 417 U.S. 642 (1974) 77, 103

Leman v. Kurtzman, 403 U.S. 602 (1971) 52

Lewis v. United States, 48 U.S.L.W. 4205 (1980) 68

Lochner v. New York, 198 U.S. 45 (1905) 11

Maher v. Roe, 432 U.S. 464 (1977) 2, 3, 12, 15, 18, 33, 35, 37, 38, 41, 51, 52, 54, 55, 56, 57, 58, 59, 64, 95

PAGE

Mathews v. DeCastro, 429 U.S. 181 (1976) 5, 37, 60

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 38, 40, 41, 42

Meyer v. Nebraska, 262 U.S. 390 (1923) 48

Moor v. County of Alameda, 411 U.S. 693 (1973) 97

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 85, 104

NLRB v. Brown, 380 U.S. 278 86

N.L.R.B. v. Yeshiva University, 48 U.S.L.W. 4175 (1980) 101

Perrin v. U. S., 48 U.S.L.W. 4009 (1980) 100

Planned Parenthood of Central Missouri v. Danforth, 423 U.S. 52 (1975) 11, 35

Poelker v. Doe, 432 U.S. 519 (1977) .....*passim*

Pre-Term v. Dukakis, 591 F.2d 121 (1st Cir. 1979) 60, 70, 83, 84, 90

Quern v. Manley, 436 U.S. 725 (1978) 70-71, 72

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 86, 104

Reeside v. Walker, 52 U.S. (11 How.) 272 (1850) 3, 23, 24, 25

Richardson v. Belska, 404 U.S. 78 (1971) 43, 91

Ries v. Lynskey, 452 F.2d 172 (7th Cir. 1971) 97

Right to Choose v. Byrne, 398 A.2d 587 (N.J. 1976) 53, 92

Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975) 97

Roe v. Norton, 522 F.2d 928 (2d Cir. 1975) 70, 97

Roe v. Wade, 410 U.S. 113 (1973) 7, 8, 11, 19, 34, 48, 57, 87

Rosado v. Wyman, 397 U.S. 397 (1970) 72

PAGE

Rush v. Parham, 440 F.Supp, 383 (N.D. Ga. 1977) 84

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) 53, 54, 59

Shapiro v. Thompson, 394 U.S. 618 (1968) 40, 41, 42

Sherbert v. Verner, 374 U.S. 398 (1963) 52

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 47

Skinner v. Oklahoma, 316 U.S. 535 (1942) 64

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1976) 47

Stanley v. Georgia, 394 U.S. 557 (1969) 48

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 66

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 104

Tilton v. Richardson, 403 U.S. 672 (1971) 52

Train v. City of New York, 420 U.S. 35 (1975) 32

Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 48 U.S.L.W. 4001 (1979) 95

United States v. Jackson, 390 U.S. 570 (1968) 42

United States v. Lovett, 328 U.S. 303 (1946) 24, 25, 26

United States v. Orito, 413 U.S. 123 (1973) 48

United States v. Rothberg, 480 F.2d 534 (2d Cir. 1971), cert. denied, 414 U.S. 856 (1973) 97

United States v. Stafoff, 260 U.S. 477 (1923) 104

United States v. Wise, 370 U.S. 405 (1962) 97

Virginia Hospital Ass'n v. Kenley, 427 F.Supp. 781 (E.D. Pa. 1977) 84

PAGE

Volkswagenwerk Aktiengesel-Ischaft v. FMC, 390 U.S. 261 (1968) 86

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 51

Whalen v. Roe, 429 U.S. 589 (1977) 4, 25, 36, 37

White v. Beal, 555 F.2d 1146 (3rd Cir. 1977) 60

Wisconsin v. Yoder, 406 U.S. 205 (1972) 51, 52, 53

Woe v. California, 460 F.Supp. 234 (S.D. Ohio 1978) .. 53

Womens Services v. Thone, 48 U.S.L.W. 2392 (D. Neb. 1979) 53

Wynn v. Scott, 449 F.Supp. 1302 (N.D.Ill. 1978) 35

Zuber v. Allen, 396 U.S. 168 (1969) 85

Statutes and Regulation

Federal

Act of October 30, 1972, Pub. L. No. 92-603, §203, 86 Stat. 1410 45

Maternity and Infancy Act of 1921, Pub. L. No. 135, 42 Stat. 224 (1921) 63

Pub. L. No. 116, 37 Stat. 79 (1912) 63

Pub. L. 89-97, July 30, 1965, 79 Stat. 345-346 (amended 1968, Pub. L. 90-248, §224[a] 75

Social Security Act of 1935, ch-531, Title V, 505, 49 Stat. 629 (1935), 28 U.S.C. §1346 23

42 C.F.R. §440.130(a) (1979) 87

42 C.F.R. §440.230 (1979) 85

42 C.F.R. §463.18 (1979) 79

42 C.F.R. §463.27(c)(3) (1979) 80

PAGE

42 U.S.C. §300a-21 54
42 U.S.C. §300a-21(a) 54, 55
42 U.S.C. §607 27
42 U.S.C. §1305 81
42 U.S.C. §1312 (1976) 78, 79
42 U.S.C. §1320C (1976) 77, 78, 79, 83
42 U.S.C. §1396 (1970) 66, 68, 71
42 U.S.C. §1396a(a)(10) (1974) 86
42 U.S.C. §1396a(a)(10)(C)(i) (1976) 72
42 U.S.C. §1396a(13) (1976) 72, 85
42 U.S.C. §1396a(a)(13)(A)(i) (1976) 75
42 U.S.C. §1396a(a)(19) (1974) 90
42 U.S.C. §1396a(a)(17) (1976) 68, 77
42 U.S.C. §1396b(e) 45
42 U.S.C. §1396d(a) 73
42 U.S.C. §1396d(a)(3) (1976) 75, 95
42 U.S.C. §1396d(a)(4) (1976) 76
42 U.S.C. §2000e 103
42 U.S.C. §2996f 104

State

Ala. Code tit. 46-270 (Supp. 1963) 97
Alaska Stat. §11.15.060 (1962) 98
Ariz. Rev. Stat. Ann. §13-211 (1956) 98, 100
Ark. Stat. Ann. §41-301 (1964) 98
Cal. Pen. Code §274 98

PAGE

Colo. Rev. Stat. Ann. §40-2-23 (1964) 98
Conn. Gen. Stat. Ann. §53-29 (1960) 98, 100
Del. Code Ann. tit. 11, §301 (1953) 98
D.C. Code Ann. §§22-201 (1961) 97
Fla. Stat. Ann. §§782.10, 797.01 (1965) 98
Ga. Code Ann. §§26-1101, -1103 (1953), §26-1207 (1971) 98, 100
Hawaii Rev. Laws §§309-3,-4 (1955) 98
Idaho Code Ann. §18-1505 (Supp. 1971) 98, 100
Ill. Ann. Stat. Ch. 38, §23-1 (Smith-Hurd 1964) 98
Ill. Rev. Stat. c. 38, §23-1 (1971) 98, 100
Ind. Ann. Stat. §10-105 (1956) 98
Ind. Code §35-1 (1971) 100
Iowa Code Ann. §701.1 (1950) 98
Iowa Code §701.1 (1971) 100
Kan. Gen. Stat. Ann. §31-410 (Supp. 1963) 98
Ky. Rev. Stat. §436.020 (1959) 98, 100
La. Rev. Stat. §14:87 (Supp. 1964) 98
La. Rev. Stat. §14:87 (Supp. 1972) 100
La. Rev. Stat. §37:1285(6) (1954) 100
Mass. Gen. Laws Ann. ch. 272, §19 (1970) 98, 100
Me. Rev. Stat. Ann. ch. 17, §51 (1965) 98
Md. Ann. Code art. 27, §3 (1957) 98
Mich. Stat. Ann. §28.204 (1962) 98
Mich. Comp. Laws §750.14 (1948) 100

PAGE

Minn. Stat. Ann. §617.18 (1964) 98, 100
Miss. Code Ann. §2223 (1957) 98
Mo. Ann. Stat. §599.100 (1953) 98, 100
Mont. Rev. Codes Ann. §94-401 (1969) 98, 100
Neb. Rev. Stat. §§28-404,-405 (1965) 98
Neb. Rev. Stat. §28-405 (1964) 100
Nev. Rev. Stat. §201.120 (1963) 98
Nev. Rev. Stat. §200.020 (1967) 100
N.H. Rev. Stat. Ann. §585:13 (1955) 98, 100
N.J. Rev. Stat. §2A:87-1 (1953) 98, 100
N.M. Stat. Ann. §40-A-5-1,-3 (1964) 98
N.C. Gen. Stat. §14-44 (1953) 98
N.D. Cent. Code §12-25-01 (1943) 98
N.D. Cent. Code §12-25-02 (1960) 100
Ohio Rev. Code §2901.16 ..... 98, 100
Okla. Stat. Ann. tit. 21, §861 (Supp. 1964) 98, 100
Ore. Rev. Stat. §163.060 (1964) 97
Pa. Stat. Ann. tit. 18, §4718 (1963) 98, 100
R.I. Gen. Laws Ann. §11-3-1 (1957) 98, 100
S.C. Code Ann. §16-82 (1962) 98
S.D. Code §13.3101 (1939) 98
Tenn. Code Ann. §39-301 (1955) 98, 100
Tex. Pen. Code Ann. art. 1191 (1961) 98
Utah Code Ann. §76-2-1 (1953) 98, 100
Vt. Stat. Ann. tit. 13, §101 (1959) 98, 100
Va. Code Ann. §18.1-62 (1960) 98

PAGE

Wash. Rev. Code §9.02.010 (1956) 98
W. Va. Code Ann. §5923 (1961) 98
Wis. Stat. Ann. §940.04 (1969) 98, 100
Wyo. Stat. Ann. §6-77 (1959) 98, 100

Miscellaneous

Beard, *Progress Toward Maternity Benefits in Massachusetts,* 11 Am. Lab. Leg. Rev. 66 (1921) 63
Boldt, *A National Program for Maternity Aid,* 11 Am. Lab. Leg. Rev. 66 (1921) 63
Brownlie, *Basic Documents on Human Rights* (1971) 9
7 Canon's, *Precedents of the House of Representatives,* §1643 (1936) 21, 22
Conf. Rep. No. 682, 89th Cong. 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Ad. News 2228, 2246, 2247 76
93 Cong. Rec. 2973-75, 2977, 2987-91 (1947) 26
122 Cong. Rec. 27679 (1976) 58
122 Cong. Rec. 20410 (1976) 58
122 Cong. Rec. 6647-6661 (daily ed. June 24, 1976) 29
122 Cong. Rec. S 10787-10807 (daily ed. June 28, 1976) 29
122 Cong. Rec. H 8631-8641 (daily ed. August 10, 1976) 29
122 Cong. Rec. H 8631-41 (daily ed. August 25, 1976) 29
122 Cong. Rec. S 14562-14570 (daily ed. August 25, 1976) 29
122 Cong. Rec. H 10312-10318 (daily ed. September 16, 1976) 29
122 Cong. Rec. S 16112-16121 (daily ed. September 17, 1976) 29

PAGE

122 Cong. Rec. S 17296-17302 (daily ed. September 30, 1976) 29

123 Cong. Rec. H 6082-6098 (daily ed. June 17, 1977) 29

123 Cong. Rec. S 11041-11056 (daily ed. June 29, 1977) 29

123 Cong. Rec. H 8327-8353 (daily ed. August 2, 1977) 29

123 Cong. Rec. 13668-13678 (daily ed. August 4, 1977) 29

123 Cong. Rec. H 10128-10134, 10170 (daily ed. September 27, 1977) 30

123 Cong. Rec. H 10829-10838 (daily ed. October 12, 1977) 30

123 Cong. Rec. H 10966-10970 (daily ed. October 13, 1977) 30

123 Cong. Rec. S 17900-17902 (daily ed. October 27, 1977) 30

123 Cong. Rec. S 18584-91, S 18621-22 (daily ed. November 3, 1977) 30

123 Cong. Rec. H 12167-12175 (daily ed. November 3, 1977) 30

123 Cong. Rec. S 19236-19240 (daily ed. November 29, 1977) 30

123 Cong. Rec. H 12485-12494 (daily ed. November 29, 1977) 30

123 Cong. Rec. H 12651-12658 (dailey ed. December 6, 1977) 30

123 Cong. Rec. H 12770-75, H 12929-31 (daily ed. December 7, 1977) 30

PAGE

124 Cong. Rec. H 5363, H 5371 (daily ed. June 13, 1978) 30

124 Cong. Rec. H 10798-10800 (daily ed. September 26, 1978) 30

124 Cong. Rec. S 16312-16388 (daily ed. September 27, 1978) 30

124 Cong. Rec H 11493-97 (dailey ed. October 4, 1978) 30

124 Cong. Rec. H 12468-87, H 12516-20 (daily ed. October 12, 1978) 30

124 Cong. Rec. H 12969-71 (daily ed. October 14, 1978) 30

125 Cong. Rec. H 5253-5262 (daily ed. June 27, 1979) 30

125 Cong. Rec. S 9851-9873 (daily ed. July 19, 1979) 30

125 Cong. Rec. S 13253-55 (daily ed. September 24, 1979) 30

125 Cong. Rec. S 13573-75 (daily ed. September 27, 1979) 30

125 Cong. Rec. S 13736-43 (daily ed. September 28, 1979) 30

125 Cong. Rec. H 8856-58 (daily ed. October 9, 1979) 30

125 Cong. Rec. S 14325 (daily ed. October 10, 1979) 30

125 Cong. Rec. H 9885 (daily ed. October 30, 1979) 85

125 Cong. Rec. H 9884-86 (daily ed. October 30, 1979) 30

125 Cong. Rec. S 16710-14 (daily ed. November 15, 1979) 30

125 Cong. Rec. H 10955-59 (daily ed. November 16, 1979) 30

125 Cong. Rec. S 16882-83 (daily ed. November 16, 1979) 30

PAGE

125 Cong. Rec. H 11614-11623 (daily ed. December 6, 1979) 30

125 Cong. Rec. H 11770-76 (daily ed. December 11, 1979) 30

125 Cong. Rec. H. 9885 (daily ed. Oct. 30, 1979) 30, 85

Constitution of 1954 of the Peoples Republic of China, ch. III (Fundamental Rights and Duties of Citizens) 9

Constitution of the United Arab Republic of 1964, art. 42 of Part III (Public Rights and Duties) 9

Constitution of Venezuela of 1961, art. 51 of Ch. IV (of Health and Social Welfare) 9

Davie, *The Open Door to Maternity Protection,* 11 Am. Lab. Leg. Rev. 311 (1921) 64

K. Davis & C. Schoen, *Health and the War on Poverty: A Ten-Year Appraisal* (1978) 63, 64

Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527 (1947) 96

George, *Current Abortion Laws; Proposals and Movements for Reform,* 17 West. Res. L. Rev. 45 (1965) 97

Gorby, *The Right to An Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement,* 1979 S. Ill. U.L.J. 1, 15-19 103

H. R. Doc. No. 663, 94th Cong., 2nd Sess. 561 (1977) 21

H. R. Rep.. No. 231, 92nd Cong., 2nd Sess. 1 (1971) 79

H. R. Rep. No. 393, 95th Cong., 1st Sess. 1, 54 (1977)..79, 84

House Rule XXI 21

PAGE

Jonas & Gorby, *West German Abortion Decision: Introduction, and Translation of the German Federal Constitutional Court Decision,* 9 J. Mar. J. Prac. & Proc. 557 (1976) 9

Knecht, *Abortion: Contradictions and Problems,* 1972 U. of Ill. L. F. (No. 1) (1972) 100

Kurland, *The Private I,* 1978 Univ. of Chicago, Magazine, 7, 8 (Autumn 1978) 37

Landis, *A Note on Statutory Interpretation,* 43 Harv. L. Rev. 886 (1930) 96

Lathrop, *The Federal Children's Bureau: Some Aspects of Its Present Work,* 20 Case and Comment 176 (1929) 63

Morehead, *Comparisons Between OEO Neighborhood Health Centers and Other Health Care Providers of Ratings of the Quality of Health Care,* 61 Am. J. Publ. Health 1294 (1971) 64

Republic of India, Constitution of 1949, art. 38 of Part IV (Directive Principles of State Policy) 9

S. Rep. 409, 89th Cong. 1st Sess. p. 80 76

S. Rep. No. 409, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News, p. 2016-17 91

S. Rep. No. 744, 90th Cong. 1st Sess. 1, 6, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2834, 2839 64

Sobel, *Need for Protecting Maternity and Infancy,* 11 Am. Lab. Leg. Rev. 74 (1921) 63

U.S.S.R. Constitution of 1936, ch. X (Fundamental Rights and Duties of Citizens) 9

Webster's Third International Dictionary 1126, (3rd ed. 1976) 101

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,

Appellant,

vs.

CORA McRAE, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSES A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

QUESTIONS PRESENTED

I. Whether the United States Congress, acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution, violated the Fifth Amendment to the Constitution by enacting the Hyde Amendment?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether States are required under Title XIX of the Social Security Act to fund all abortions deemed "medically necessary"?

SUMMARY OF THE ARGUMENT

This is not a "right to privacy" case. It is a case about disbursal of public funds in a federal social and economic program. The district court's decision that the United States must fund the exercise of the privacy right is at odds with the nature of American constitutional tradition, in which "rights" denominate the liberties of the individual as against the State, rather than an obligation of the State to assist an individual to reach some end. Whether or not constitutional rights will be implemented by the State is a matter for Congress, not the courts, under our system of government.

The practical effect of the district court's ruling that the government must fund all "medically necessary" abortions is that all legally permissible abortions, including elective abortions, must be funded. This is so because the district court has adopted the very broad definition of medical necessity set forth by this Court in *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973). The testimony of the plaintiffs' physicians in the lower court as well as the lower court's opinion itself reinforces this fact. Dr. Jane Hodgson testified for the plaintiffs that every abortion that is not wanted is "medically necessary." A. at 146. Two other of plaintiffs' physicians testified that whether an abortion is wanted or not is the "key factor" in determining whether the abortion is "medically necessary." Other of plaintiffs' physicians testified that the term "medically necessary" is a preventive medicine standard. Another of plaintiffs' physicians testified that all abortions for adolescents are "medically necessary." The lower court cited numerous instances in which abortion is considered "medically necessary." The court found that fetal abnormality is a "medically necessary" reason for abortion because it presents a threat to family stability. The court even held that "poverty itself . . . is a medically relevant factor" (slip op. at 160), permitting the inference that all abortions performed on indigents may be certified as "medically necessary."

Because of the way in which the lower court used the term "medically necessary," an affirmance of the lower court ruling would have the practical effect of overruling *Beal* v. *Doe,* 432 U.S. 438 (1977), *Maher* v. *Roe,* 432 U.S. 464 (1977), and *Poelker* v. *Doe,* 432 U.S. 519 (1977).

The order of the district court requiring that funds be paid for all "medically necessary" abortions contravenes Article 1, §9, cl. 7 of the United States Constitution which vests in Congress the sole power to appropriate funds. Congressional precedent and the language of the Hyde Amendment itself make clear that Congress has not appropriated funds to pay for abortions except for those limited categories of abortions mentioned in the Hyde Amendment. The lower court was in error believing that funds exist in the general appropriation which may be disbursed for all "medically necessary" abortions once the Hyde Amendment is enjoined.

The judiciary has consistently refused to arrogate unto itself the appropriations power of Congress. *Knote* v. *United States,* 95 U.S. 149 (1877); *Reeside* v. *Walker,* 52 U.S. (11 How.) 623 (1850); *Doe* v. *Mathews,* 420 F. Supp. 865 (D. N.J. 1976).

The question of which abortions the United States Congress would fund is a "political question" and is thus nonjusticiable. The principles of nonjusticiability are set forth in the "political question" cases, *e.g., Baker* v. *Carr,* 369 U.S. 186 (1962). Those principles are applicable here and counsel in favor of deference to congressional judgment.

As this Court has held, there is no obligation on the State to pay any of the medical expenses of indigents. *Maher* v. *Roe,* 432 U.S. at 487. Therefore, there can exist no fundamental right to a governmentally subsidized "medically recommended" abortion. Prior cases decided by this Court which involved state criminal penalties imposed on the right of privacy which included a "medically recommended" abortion no more apply here than they did in

Maher v. *Roe.* Failure to provide funds to implement rights of privacy does not represent direct state interference with the exercise of such rights. Moreover, the physician who recommends an abortion can claim no independent right of his own has been burdened by the Hyde Amendment. *Whalen* v. *Roe,* 429 U.S. 589, 604 n.33 (1977). Since the woman cannot claim that her right of privacy has been burdened through mere state failure to fund her decision to abort, neither may the physician. Whether or not the government funds any abortion is an "economic, social, and even philosophical problem" for the Congress to decide. *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970).

The Hyde Amendment imposes no penalty or condition on an exercise of the woman's right of privacy. It does not withdraw general welfare benefits because of any past act of the woman; it does not condition receipt of general welfare benefits on forfeiture of the woman's right of privacy. The Hyde Amendment simply excludes reimbursement for a certain category of treatment to encourage alternative forms of treatment. *See Geduldig* v. *Aiello,* 417 U.S. 484 (1974). Because a physician believes abortion is medically recommended, he cannot transform the Amendment into what amounts to a fine. The government has no obligation to fund even the most "basic economic needs" in any case. *Dandridge* v. *Williams,* 397 U.S. at 485. Analysis of this Court's prior decisions finding that governmental assistance programs created a penalty on the exercise of a fundamental right demonstrates that the Amendment creates no such penalty.

The existence of the medicaid program does not generate any due process right to federally funded abortions. The medicaid eligible woman has a "property interest" in her *status* as a potential recipient of governmental benefits, but her interest in the government *funds* which may or may not be allocated toward any purpose under the Medicaid Title is merely speculative. *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564 (1972).

The medicaid program is enacted for certain classes and for specific purposes perceived to serve the public interest. The potential recipient cannot properly claim that the existence of the program generates a "right of access" to whatever funds are allocated to its purposes in order to exercise her private rights. Moreover, rights of privacy lose their fundamental character when exercised outside the zone of privacy created for them by the Constitution. Therefore, unlike freedom of speech or the right to travel, the right of privacy which includes abortion can make no demand to access in the pool of federal funds supplied to implement the medicaid program.

The Hyde Amendment does not inhibit free exercise of religion. The Free Exercise Clause does not protect decisions merely because they are conscientiously made under the aegis of religious authority. To fund decisions to abort in order to implement the free exercise of a religiously inspired decision to abort would violate the Establishment Clause. The Hyde Amendment does not discriminate on the basis of religion, and it creates no condition on its exercise.

The "statutory class of adolescents at high risk of pregnancy" as defined by Congress does not constitute a suspect class under the Constitution. Legislatures do not create "suspect classes"; the Constitution does. In any case, the Amendment does not discriminate against the statutory class of adolescents at risk of pregnancy: all women are treated the same by the Amendment.

The Hyde Amendment is rationally related to the valid governmental interest in protection of the fetus. The district court acknowledged that preservation of fetal life was the purpose of the Amendment, but characterized this interest as "insufficient" when it conflicts with the State's interest in maternal health. Since "governmental decisions to spend money . . . in one way and not the other" are not the business of the courts, *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976), the district court usurped legislative prerogatives by striking the Amendment. The state's

interest in childbirth and the woman's right to childbearing are of greater constitutional import than the right of privacy which encompasses abortion. In addition to the state's interest in protection of the fetus, the Hyde Amendment serves a valid interest in recognition of the moral precepts of the American people.

The Medicaid Title of the Social Security Act does not preclude States, in their discretion, from declining to fund abortions not necessary to preserve maternal life, particularly when considered in light of the "cooperative federalism" which animates the Social Security Act, and in light of Congress's repeated votes expressing an intent to fund abortion only in very narrow circumstances.

The *Beal* holding that the standard by which the validity of state coverage determinations should be judged is whether they are "reasonable" and "consistent with the objectives of the Act" should be reaffirmed. In contrast to the lower court's ruling that all "medically necessary" items within five mandated categories must be covered, the *Beal* standard is supported by the plain language of the Title, legislative history, and other portions of the Act, as well as the current regulations.

Beal correctly held that the state's legitimate interest in fetal life is not inconsistent with the objectives of the Title. It is reasonable for a State to refrain from funding abortions not necessary to preserve maternal life in view of this interest, the availability of alternative treatments to deal with complications of pregnancy, and the fact that a "medically necessary" standard means that elective abortions will be funded.

Even if the *Beal* standard were overturned, and a "medically necessary" standard substituted, the fact that abortions other than those necessary to save the life of the mother were illegal in most States when the Medicaid Title was passed, together with the national policy repeatedly expressed by Congress to disfavor abortion and abortion funding except when maternal life is endangered, would justify state decisions not to fund.

ARGUMENT

I.

INTRODUCTION

This is not a right to privacy case. It is a case about the appropriation and disbursement of public funds under federal and state medicaid programs. But because it concerns the disbursement of governmental funds for abortion, this case evokes passions on both sides of the abortion controversy raging in the nation for the past decade; it attracts the attention of the media, and captures the interest of the public at large. The subject of abortion rouses deep convictions, even among members of the judiciary, that make impartial resolution of the issues in this case in accord with strict constitutional principles difficult. As this Court recognized in *Roe* v. *Wade,*

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> In addition, population growth, pollution, poverty and racial overtones tend to complicate and not to simplify the problem.

Roe v. *Wade,* 410 U.S. 113, 116 (1973).

The danger this Court acknowledged in *Roe* is that this case may be treated differently than others because it involves abortion, or that its resolution might be based more on predisposition than on established principles of constitutional law and political theory. But, as in *Roe,* the "task" now facing this Court is "to resolve the issue by

constitutional measurement, free of emotion and predilection." *Roe* v. *Wade,* 410 U.S. at 116.

Although this case touches on the subject of abortion, from a jurisprudential and constitutional perspective this is neither an "abortion case" nor a right to privacy case. This case does not involve any substantive constitutional rights of persons; it involves appropriations made by the Congress for use in an economic and social welfare program.

The constitutional rights (right to privacy and free exercise of religion) which the district court held are infringed by the Hyde Amendment are "non-interference" rights—freedoms or immunities from governmental restraint or interference. Indeed, all of the rights set forth in the Bill of Rights are properly characterized as "non-interference" rights: freedom of speech, expression, and belief; freedom of religion; freedom of assembly and association; freedom to petition the government; freedom from unreasonable searches and seizure; freedom from arbitrary arrest; and freedom from being twice placed in jeopardy. In this regard, the "right to privacy" is not different from those rights explicitly stated in the Bill of Rights —in part because, though not explicitly mentioned in the Bill of Rights, it was discovered in the penumbras of other non-interference rights. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). The purpose of "non-interference" rights is to secure freedom. The obligation of the State with respect to these rights is negative: to refrain from interference. These rights impose no positive obligation whatsoever on the government, except perhaps to create independent courts to protect and to act as guardians of the freedom of the individual as against the various branches of government. This conception of the fundamental right as a freedom from governmental interference accurately reflects the liberal political theories of the 18th and early

19th centuries which were fully incorporated into the U.S. Constitution and its Bill of Rights.

In contrast to the American conception of fundamental rights as freedom from interference by others, particularly the State, are theories of fundamental rights incorporated into many constitutions of this century—constitutions which establish affirmative obligations on the State to provide certain economic and social benefits to its citizens and to intervene on behalf of fundamental rights. For example, an affirmative constitutional obligation to protect rights and freedoms of individuals from infringement by others, not merely to refrain from interfering with them, can be found in the Basic Law of the Federal Republic of Germany, which obligates the State to act to protect rights and freedoms set forth in the German Constitution. This explains the obligation on the German State to enact effective legislation to protect the lives of all individuals. *See, e.g.,* Jonas & Gorby, *West German Abortion Decision: Introduction and Translation of the German Federal Constitutional Court Decision,* 9 J. Mar. J. Prac. & Proc. 557 (1976). Other examples of recent constitutions which obligate the State to act affirmatively are the U.S.S.R. Constitution of 1936, ch. X (Fundamental Rights and Duties of Citizens); the Republic of India, Constitution of 1949, art. 38 of Part IV (Directive Principles of State Policy); Constitution of 1954 of the Peoples Republic of China, ch. III (Fundamental Rights and Duties of Citizens); Constitution of the United Arab Republic of 1964, art. 42 of Part III (Public Rights and Duties); Constitution of Venezuela of 1961, art. 51 of ch. IV (Of Health and Social Welfare). *See generally* Brownlie, *Basic Documents on Human Rights* (1971).

The U.S. Bill of Rights imposes none of these affirmative obligations on the State to act. The U.S. Constitution, a product of another political era and other political theories, is very different from many constitutions of the 20th

century which impose affirmative obligations on the State and which establish certain economic and social programs which the State must pursue.

There is, of course, nothing in the U.S. Constitution which *precludes* the State from taking affirmative steps to establish social and economic programs to "provide for the general welfare of the United States." U.S. Const. art. I, §8, cl. 1. But the Constitution does not require or obligate the State to create such programs. Instead, it explicitly vests the legislative branch of the federal government, the Congress, with the exclusive authority to decide whether, how, and to what extent such programs should be created.

The constitutional amendments are phrased in the rhetoric of this understanding of fundamental rights.[1] Since the fundamental rights themselves do not impose affirmative obligations on the State to act, the Amendments setting forth these rights often vest the *Congress* with the power to enforce them with appropriate legislation in a separate section.[2] Nothing suggests the Congress *must* act. That

[1] For example, Amendment I (1791) provides "Congress shall make no law. . . .": Amendment XIV (1868) provides "no State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property . . . ; nor deny . . . equal protection of the laws": Amendment XV (1870) provides "The right of citizens to vote shall not be denied . . . by the United States or any State. . . ." *See also* Amendments XIX (1920), XXIV (1964), XXVI (1971). The proposed Equal Rights Amendment provides that "Equality of rights . . . shall not be denied or abridged by the United States or by any State on account of sex."

[2] Amendments XIII (1865), XIV (1868), XV (1870), XIX (1920), XXIII (1961), XXIV (1964), XXVI (1971), as well as the proposed ERA Amendment, each provide that "Congress shall have the power to enforce this article by appropriate legislation." This suggests that any affirmative action taken is left to the Congress, not required by the Constitution itself.

is left to the normal democratic processes. Only in this light is Justice Holmes' "now vindicated dissent in *Lochner* v. *New York*, 198 U.S. 45, 76 (1905)", *Roe* v. *Wade*, 113 U.S. at 117, intelligible:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

As Justice Cardozo stated in *Helvering* v. *Davis*, 301 U.S. 619, 644 (1937),

> Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the Courts. Our concern here, as often, is with power, not with wisdom.

Clearly, as Mr. Justice Stewart stated in *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1969),

> [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

All of the "right to privacy" cases fall within this pattern and tradition. *See, e.g., Baird* v. *Bellotti*, 99 S.Ct. 3035 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Planned Parenthood* v. *Danforth*, 423 U.S. 52 (1975); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), all invalidating state statutes because those statutes (all criminal in nature) impinged upon the individual's zone of privacy.

Maher v. *Roe,* 432 U.S. 464 (1977), and *Poelker* v. *Doe,* 432 U.S. 519 (1977), also fall within this pattern and are part of this tradition of American jurisprudence. In both cases this Court investigated the possibility that state actions infringed on a fundamental freedom, concluding that they did not. In both cases this Court rejected the notion that the Constitution imposes an affirmative obligation to act, expressly noting in *Maher* that "the Constitution imposes no obligation on the state . . . to pay any of the medical expenses of indigents," *Maher* v. *Roe,* 432 U.S. at 469, and further noting:

> We emphasize that our decision today does not proscribe government funding of nontherapeutic abortions. It is open to Congress to require provision of Medicaid benefits for such abortions as a condition of state participation in the Medicaid Program. Also, under Title XIX . . . Connecticut is free—through the normal democratic processes—to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

Id. at 480.

The district's court's decision in this case is, however, utterly inconsistent with the established meaning of fundamental rights in American constitutional law. It is premised on the notion that the Constitution imposes upon the government affirmative obligations: 1) to provide funding for health related abortions, 2) to provide funding for abortions when they are regarded as a religious duty, and 3) to prefer its interest in the health of its citizens over its interest in prenatal human life and childbirth. Apparently, the district court believes that, contrary to all precedent, the Constitution does indeed impose far-reaching affirmative obligations on the government to enact welfare programs. Apparently, the district court believes that Justice Holmes was wrong: that the Constitution does indeed impose on American society an obligation to enact Mr. Herbert Spencer's social and economic system (or perhaps more accurately, that of some other social philosopher of the opposite persuasion). Thus, any attempt to distinguish *Maher* on the theory that *Maher* deals with "nontherapeutic" abortions, whereas this case deals with "therapeutic" abortions, will not avoid the much more fundamental issue presented here: whether the Constitution imposes a judicially determined resolution on funding and appropriations issues, or whether the responsibility for promoting the general welfare is vested in the Congress. Acceptance and affirmation of the district court's decision will mark a radical and revolutionary departure from the traditions implicit in the American constitutional system.

The district court fails to understand this division of powers within the federal State which lies at the very heart of the American constitutional order. Indeed, the mammoth 329-page opinion (not including 300 pages of appendix) of the district court testifies to its attitude toward the role of the judiciary. The district court functioned as a "legislative hearing officer," collecting facts of the type the legislature normally considers in deciding what laws to enact, and consigning those facts to the "wisdom" of the judiciary, thus "second-guessing" the Congress. In fact, the first 275 pages of the district court's opinion deal with "legislative facts"—not with the traditional adjudicative facts concerning who did what, when, where, and how, or with legal analysis. Significantly, the district court's findings of fact are findings of "legislative facts"—not adjudicative facts. It draws conclusions about the nature of medicine and abortion, about the efficacy of alternative treatment, about the nature of religious beliefs, about political motivations, and so forth.

Yet the district court is in no better position to make permanent findings about the nature of reality

from the perspective of the science of medicine, or about the principles of a given theological system, than was the State of Tennessee in a position to make findings about the accuracy of Darwin's theories of evolution. Of course, if laws are to be wise, the lawmaker must seek accurate insights. But when such determinations are made by a court under the guise of constitutional interpretation, findings of legislative fact are "etched in stone" and take on the nature of Ultimate Truth. This precludes the reevaluation of the facts and the social experimentation which only a flexible legislature can employ.

The district court perceives it to be the function of this Court to consider all the legislative facts which it has so laboriously accumulated and marshalled, and to use these facts in performing a law-making function. But such an understanding of the function of this Court is unsound and incompatible with the United States Constitution. The function of this Court is to protect the freedoms set forth in the Constitution and to ensure that the division of powers in the State is honored. The Constitution vests Congress, not the judiciary, with the power to make decisions concerning appropriations and disbursements for the general welfare.

Plaintiffs below, having lost their case in Congress, requested the judiciary to write a law which conforms to their preferences. The district court granted them all that Congress had refused. Now they ask this Court to ratify that victory. But the entire tradition of American constitutional jurisprudence stands in their way.

II.

AN AFFIRMANCE OF THE DISTRICT COURT'S DECISION WILL IN PRACTICAL EFFECT OVERRULE THIS COURT'S RECENT DECISIONS IN MAHER v. ROE AND POELKER v. DOE

A. In Effect, the District Court Ordered the Government to Pay for All Abortions, Including Elective Ones, Which a Physician Is Willing to Perform on a Medicaid-Eligible Woman

The issue in this case is whether the Constitution requires the government to fund *elective* abortions.

The lower court held that the government must fund all "abortions that are necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman." *McRae* v. *Secretary,* 76 C 1804 (E.D.N.Y. January 15, 1980) [hereinafter cited as "slip op."], Judgment at 1-2. This language is taken almost verbatim from the language of this Court in *Doe* v. *Bolton,* 410 U.S. 179, 192 (1973), in which it was used to uphold a law which, as construed, made *illegal* all abortions not encompassed by that description. Thus, the practical effect of the district court's ruling is that all legally permissible abortions, including those heretofore considered purely elective, must be funded.

The holdings in the lower court's opinion, as well as the testimony on which the court relied, reinforce the plain meaning of the court's order. If a pregnancy is "unwanted," in the view of the lower court, that makes an abortion "medically necessary": "The medical evidence emphasized repeatedly the physiological as well as the psychological criticality of the pregnant woman's attitude to

the pregnancy. . . . The long tasks of pregnancy require prenatal care on the woman's part that the woman whose pregnancy is unwanted has neither the will nor the resources of patience to carry out effectively." Slip op. at 111. The court specifically relied on Drs. Hodgson, Eliot, and Momney. *Id.* Dr. Hodgson testified that "every pregnancy that is not wanted by the patient . . . there is a medical indication to abort. . . . I think they are all medically necessary." A at 146. Dr. Eliot, T. at 427, and Dr. Romney, A. at 153, testified that as they use the term "medically necessary," it is a "preventive medicine standard." Dr. Eliot emphasized that an unwanted pregnancy gives rise to a medically necessary reason for an abortion. *See also* testimony of Dr. Sloan who said that whether pregnancy is wanted or unwanted is the "key factor" in determining whether an abortion is "medically necessary," T. at 1734. When the district court's language (*e.g.*, "The unwanted pregnancy is times without number the focus of emotional and psychic disturbance that, especially in the cases of the indigent, are often unsupportable psychically. . . . [U]nwanted pregnancies leading to involuntary childbirth are disruptive of family life" [slip op. at 161-162]) is read in conjunction with its order that "emotional" and "familial" factors can make abortion "medically necessary" and permit a physician to demand reimbursement, there can be little doubt of the utterly unlimited character of the "medically necessary" abortion.

The lower court cited the following circumstances as requiring "medically necessary" abortions:

> —[A] woman already burdened with the care of two retarded children who became pregnant despite use of an IUD. She feared a third child would be retarded, or, if not, beyond her capacity to rear properly in addition to caring for the retarded children.

Slip op. at 118.

> —[W]omen whose pregnancies occur in such circumstances of poverty, slum subsistence in substandard housing, and helpless insecurity that their pregnancies become unendurably stressful and emotionally destructive.

Slip op. at 123.

> —[P]laintiff 'Susan Roe,' [who wrote an affidavit] *expressing her fear* that if she carries her pregnancy to term, she will become an abusive parent like some of her friends.

Slip op. at 130 (emphasis added).

> —[T]he professional standards of medicine accept that grave fetal defects . . . may make abortion medically necessary in the judgment of a large part of the medical profession. [Apparently this is because] The child born with serious birth defects presents a grave threat to family stability and to the rearing of the defective child's siblings.

Slip op. at 130, 309.

> —[The court emphasized that] poverty is itself . . . a medically relevant factor, [permitting the inference that all abortions performed on indigents (*i.e.*, all medicaid recipients) may be certified as "medically necessary"].

Slip op. at 160.

> —[The pregnant teenagers who] run higher risks of unemployment and welfare dependency than those who delay parenthood until their twenties; [Dr. Hoffman testified that *all* abortions for adolescents are medically necessary].

Slip op. at 136; T. at 1342.

Should there be any remaining doubt about the all-encompassing nature of the standard under which the court mandated the government to fund abortions, it is dispelled by the lower court's description of the sense it attributes to "medical necessity" in the opinion of this Court which it "adopts":

> [T]he Court's standard was *not* one of *preserving* life *or health* but a decision inherently and primarily medical but which considered the pregnancy in the total circumstances, medical, societal, familial and economic in which the pregnancy existed.

Slip op. at 89 (emphasis added).

Anyone who reads, or even skims, the district court's voluminous opinion with its exhaustive detailing of virtually every possible social or personal factor which might lead a woman to terminate a pregnancy can have no doubt that in the court's view the consequences of a poor woman continuing a pregnancy she does not want are so horrible that in such instances one could never say an abortion was not, in the court's definition, "medically necessary."

B. The District Court Improperly Distinguished Maher and Poelker By Distorting the Meanings of "Therapeutic" and "Nontherapeutic"

The district court wrote that "[t]he ultimate common holding of these three cases [*Maher, Beal,* and *Poelker*] . . . is . . . that nontherapeutic abortion is an unnecessary medical service . . .," and that when and only when an abortion is not medically necessary, the States may refuse to fund it.

The district court defined therapeutic abortion as follows:

> There is . . . the therapeutic abortion, the abortion the attending physician considers *in some sense* medically necessary to the successful treatment of the health of the pregnant woman. . . . The concern of the attending physician is with determining whether abortion is, in the Supreme Court's language in *Roe* v. *Wade,* 'necessary,' in appropriate medical judgment, for the preservation of the life or health of the mother (410 U.S. at 165).

Slip op. at 84 (emphasis added).

Since the lower court's notion of the "medically necessary" abortion encompasses all that might conceivably fall within the *Bolton* factors (*see* this Brief at 15-18), and thus all legal abortions, the class of "nontherapeutic abortions" becomes a null set.

Concisely stated, what this Court held in *Bolton* is that the right to protect one's health is an aspect of the right to privacy. It then defined "health" very broadly to demark the outer limits of the right to privacy and thus the limits of the State's authority to interfere with and regulate the abortion decision. Indeed, in *Bolton* this Court held that if the abortion is not a "health" abortion, it is *not* protected by the right to privacy and may be proscribed by the State. In *Bolton* the Court upheld a criminal provision in the Georgia abortion statute which punished the performance of an abortion except when it is "based upon the physician's best clinical judgment that an abortion is necessary," *Bolton,* 410 U.S. at 191, when that language was given the saving gloss of the *Bolton* factors which the lower court has now identified with the concept of a "therapeutic abortion." Thus, if the abortion is "medically necessary" as broadly defined by this Court in *Bolton,* it

is immune from state interference. If it is not "medically necessary" in this very broad sense, the abortion does not "relate to health" and falls without the zone of constitutionally protected privacy. Consequently, it is not immune from state interference. Expressed differently, "purely elective" abortions may be proscribed. Surely the constitutional significance of *Maher* and *Poelker* supercedes the commonsense proposition that the State need not fund activities which the State may make illegal. Nonetheless, if the concept of "medical necessity" employed by this Court in *Bolton* to demark the outer limits of the right to privacy in a right to privacy case is transported uncritically, as was done by the lower court, *Maher* and *Poelker* will have the following significance: in practice the state and federal government will have to fund *all* abortions performed by a physician. Only a virtually non-existent class of abortions—those which fall outside the zone of privacy—need not be funded. Expressed differently, the State need not fund abortions which it may proscribe, but it must fund all abortions which the Constitution permits.

This, of course, is an absurd reading of *Maher* and *Poelker*. Indeed, *Maher* and *Poelker* never would have inspired the vigorous dissents if they were so utterly without practical significance.

III.

THE HYDE AMENDMENT WAS ENACTED UNDER THE APPROPRIATION POWER WHICH THE CONSTITUTION VESTS EXCLUSIVELY IN THE CONGRESS

The decision of the district court ordering Congress to pay for abortions violates the United States Constitution, which vests exclusively in the Congress the power to ap-

propriate funds, and the decision ignores the political question doctrine which dictates that the issue is non-justiciable.

A. The District Court's Order Infringes Upon The Appropriations Authority of Congress

The order of the district court contravenes Article I, §9, cl. 7 of the United States Constitution which vests in Congress the sole power to appropriate funds. The Constitution provides:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

U.S. Const. art. I, §9, cl. 7.

The district court mistakenly assumed that Congress appropriated money for the general purpose of Title XIX medicaid expenditures and that, by holding unconstitutional the Hyde Amendment, the appropriations already made by Congress could be used for abortions. This assumption of the district court reflects a fundamental misunderstanding of the Constitution's delegation of the appropriations power exclusively to Congress and ignores judicial precedents in which this Court has refused to arrogate to itself this exclusive "power of the purse."

The Hyde Amendment was authored under House Rule XXI, known as the Holman Rule, which allows amendments to appropriations bills if they are "germane to the subject matter of the bill" or "retrench expenditures by . . . the reduction of the amounts of money covered by the bill." *See*, 7 *Cannon's Precedents of the House of Representatives* §1643 (1936); Rules of the House of Representatives, H.R. Doc. No. 663, 94th Cong., 2nd Sess. 561 (1977). The Hyde Amendment meets both of these requirements.

For over a century the House has ruled that a Holman Rule amendment means that there is no appropriation for the matter or activity for which "none of the funds contained in this act shall be used. . . ." 7 *Cannon's Precedents of the House of Representatives* §1643. *See also Doe* v. *Mathews*, 420 F. Supp. 865, 870-71 (D.N.J. 1976).

Thus, the Hyde Amendment, having been proposed under the Holman Rule, became part of the HEW appropriation Act itself.

The Hyde Amendment is not a "substantive" amendment to Title XIX in the sense that it amends the language of that Act. This should be obvious from the fact that an appropriations act expires at the end of the appropriations period—namely, one year later. It would be most unusual for a substantive amendment to an enactment to expire within one year of its enactment when the amendment itself did not so state. Consequently, the Hyde Amendment may reasonably be viewed only as an appropriations act.

The Hyde Amendment, however, does have "substantive" *impact*. It indicates to the States that no federal funds will be available to reimburse the States for abortions other than for those specified in the Hyde Amendment and may induce and encourage the States to follow the example of the Hyde Amendment by accordingly amending state medicaid law. It does not have any further substantive effect on state law.

However, in the event that this Court finds that Title XIX requires the States to fund in the five mandated categories all medically necessary procedures, including abortions, then, *in that event only,* this Court must determine the effect of the Hyde Amendment on the spirit of "cooperative federalism" between the federal government and the States which is the basis for the Medicaid Act

itself. *See King* v. *Smith,* 392 U.S. 309, 313, 316 (1968). The spirit of cooperative federalism teaches that in no event should the States be required to pay for abortions under Title XIX when the federal government does not. To this extent, the Amendment may be viewed as "substantively" amending Title XIX.

However viewed, the Hyde Amendment is a statement by Congress that no funds are appropriated for abortion funding except for the limited categories specifically mentioned on the face of the Hyde Amendment. Thus, the district court is in error in believing that funds exist for all so called "medically necessary" abortions in the general appropriation and that these funds may be disbursed once the Hyde Amendment is enjoined. What Congress actually did with the Hyde Amendment was to appropriate funds for abortions necessary to save the life of the mother and for abortions in which pregnancy resulted from rape or incest. No funds were appropriated for abortions deemed justified by any other circumstance. The fact that funds are now being drawn from the Treasury without an appropriation having been made by Congress is a direct violation of Article I, §9, clause 7 of the United States Constitution.[3]

---

[3] The named defendant Secretary is the wrong federal party defendant. To the extent the action is deemed as seeking ultimately a monetary judgment against the Treasury, the proper federal defendant would be the United States of America, and the district court would lack jurisdiction over the controversy under 28 U.S.C. §1346. *See, e.g., Reeside* v. *Walker,* 52 U.S. (11 How.) 272, 289-90 (1850); *Harrington* v. *Bush,* 553 F.2d 190, 194-95 (D.C. Cir. 1977). Alternatively, to the extent it is deemed as an action to require an appropriation of funds, the proper party defendant would be Congress, but the action is barred for lack of waiver of sovereign immunity. *See generally, Reeside* v. *Walker,* 52 U.S. (11 How.) at 298-90; *see also, Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937); *Doe* v. *Mathews,* 420 F. Supp. 865, 870-71 (D.N.J. 1976).

This Court has consistently refused to arrogate the appropriations power of Congress to itself in cases in which this important separation of powers question was in issue. *United States* v. *Lovett,* 328 U.S. 303 (1946); *Austin* v. *United States,* 155 U.S. 417 (1894); *Knote* v. *United States,* 95 U.S. 149 (1877); *Hart* v. *United States,* 118 U.S. 62 (1868); *Reeside* v. *Walker,* 52 U.S. (11 How.) 272 (1850).

In *Knote* v. *United States* this Court refused to award the petitioner the proceeds from the sale of his property confiscated by the federal government under a confiscation act after he was pardoned. This Court said:

> If the proceeds (of the sale) have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Monies once in the Treasury can only be withdrawn by an appropriation by law.

Knote v. *United States,* 95 U.S. at 154.

Reeside v. *Walker* is equally clear, this Court writing:

> No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by Congress. See Constitution, Art. I, §9, I Stats. at Large, 15.

> However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.
>
> Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the Treasury can, and doubtless will, discharge the claim without any *mandamus.* But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made.

Reeside v. *Walker,* 95 U.S. at 154 (emphasis in original).

The district court's discussion of *United States* v. *Lovett,* 328 U.S. 303 (1946), indicates that it believed *Lovett* to be indistinguishable from this case. Slip op. at 289-290. *Lovett* involved the enactment of an appropriations bill to which an amendment was attached that barred, after Nov. 15, 1943, the payment of any past, present, or future monies appropriated for the salary or compensation of three named federal employees except as jurors or soldiers. Congress enacted the measure because it suspected these three persons had engaged in un-American activities but the Executive branch refused to discharge them. The district court found in *Lovett* not only the authority for judicial scrutiny of an appropriation of Congress but also the authority to order an appropriation.

Lovett differs significantly from this case. In *Lovett* this Court held that the purpose of Congress was "not merely to cut off respondents' compensation through regular dis-

bursing channels but permanently to bar them from government service. . . ." The Court said further that the "language as well as the circumstances of its passage . . . showed that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other government agency." *United States* v. *Lovett,* 328 U.S. at 314. This Court found the statute to be unconstitutional as a bill of attainder and therefore it did not stand as an obstacle to payment of compensation to the three federal employees. 328 U.S. at 318.

The *Lovett* Court did not order Congress to appropriate funds to the respondents, it merely allowed compensation. *Lovett* and the other respondents received compensation only because Congress, after extended debate, voted (99-98) to pay them. 93 Cong. Rec. 2973-75, 2977, 2987-91 (1947). The district court finds support in *Lovett* for judicial scrutiny, slip op. at 290, but this Court's review was related to the "bill of attainder" aspect of the case, not the appropriations aspect. Here, the district court has gone far beyond *Lovett* into the exclusive role of Congress to appropriate funds. *Lovett* provides no support for the district court's ruling.

It should be noted that another federal court, in *Doe* v. *Mathews,* 420 F. Supp. 865 (D.N.J. 1976), reached a conclusion opposite to that of the district court here in ruling on the question of whether the Hyde Amendment was an exercise of the appropriations power of Congress. the court in *Doe* v. *Mathews* said that a declaratory judgment that the Hyde Amendment is unconstitutional or an injunction against the Secretary of Health, Education and Welfare prohibiting enforcement of the Hyde Amendment

would be "a futile and meaningless judgment. This is because of the fact that if Secretary Mathews were to ignore the Hyde Amendment pursuant to such a judgment, the Secretary of the Treasury would remain bound to observe the Hyde Amendment and refuse to draw any monies out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions." *Doe* v. *Mathews,* 420 F. Supp. at 870-871.

The district court relies heavily on this Court's recent ruling in *Califano* v. *Westcott,* ..... U.S. ....., 99 S. Ct. 2655 (1979). Challenged in *Westcott* was the constitutionality of Section 407 of the Social Security Act, 42 U.S.C. §607, the "Aid to Families with Dependent Children, Unemployed Father" (AFDC-UF) provision. This program provides benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father, but provides no benefits in case of unemployment of the mother. This Court, after concluding that the gender classification does not substantially relate to the attainment of any important and valid statutory goals, faced the problem of fashioning a remedy. Two alternatives were considered: 1) declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or 2) extend the coverage to include those who are aggrieved by the underinclusive classification. *Califano* v. *Westcott,* 99 S.Ct. at 2663. This Court noted that approximately 300,000 needy children were receiving benefits under the program and "an injunction suspending the program's operation would impose hardships on beneficiaries whom Congress plainly means to protect." *Califano* v. *Westcott,* 99 S.Ct. at 2664. Therefore, the Court merely extended the benefits to include families in which either the mother or father is unemployed within the meaning of the Act.

1) The district court's reliance upon *Califano* v. *Westcott,* slip op. at 285, 288-289, 292, is ill-founded for two important reasons.

In *Westcott,* this Court noted that "all parties before the district court agreed that extension was the appropriate remedy. . . . Appellees support that remedy here, and the Secretary, while arguing in favor of §407's constitutionality, urges that, if the statute is invalidated, the district court's remedy [of expansion of the program] should be affirmed." *Califano* v. *Westcott,* 99 Sup. Ct. at 2664. This agreement of the parties in *Westcott* is extremely significant since it practically and theoretically removed the appropriations issue from consideration by the *Westcott* court whereas here the appropriations issue lies at the heart of this dispute.

2) *Califano* v. *Westcott* did not involve an Act of Congress that explicitly refused to appropriate funds for a certain purpose, as is the case here. And thus it was reasonable for this Court in *Westcott* to infer that Congress would have preferred to benefit the excluded class as opposed to depriving the intended beneficiaries of benefits. It would be manifestly unreasonable for this Court to reach such a conclusion here, since every time the issue of the funding of abortions has been before Congress, Congress has refused to fund. Here, the intention of Congress not to fund abortion is unmistakable. Indeed, the entire HEW-Appropriations Bill was held up until an acceptable agreement on Hyde Amendment language could be worked out. *See, e.g.,* slip op. annex. at 218, 224-225, 302.

Thus, *Westcott* cannot be cited as authority for a judicial power to appropriate funds. At best, it stands for the proposition that this Court has the authority to determine the intent of Congress with respect to a welfare enactment

and to order an expenditure if it would be reasonably consistent with congressional intent. If such is the case, it is Congress who has appropriated, not the Court. Here, of course, no such intent is discoverable, since no such intent existed.

Nor is it persuasive that the federal government funded abortion until the first Hyde Amendment in 1976. The fact that abortion was funded for a several year period prior to the first Hyde Amendment only supports the conclusion that the statutory language of Title XIX is capable of being construed to permit the funding of abortion, not that Title XIX requires such funding or that Congress approved of such funding. *Beal* v. *Doe,* 432 U.S. 438, 446 n. 10 (1977).

B. The Hyde Amendment Raises A "Political Question" Which the Judiciary Should Not Review

Appropriation matters are essentially political in nature,[4] are best resolved by the legislature, and are not suit-

---

[4] The Hyde Amendment has been the subject of extremely protracted and heated debate in Congress. *See:*

122 Cong. Rec. H 6647-6661 (daily ed. June 24, 1976);
122 Cong. Rec. S 10787-10807 (daily ed. June 28, 1976);
122 Cong Rec. H 8631-8641 (daily ed. August 10, 1976);
122 Cong. Rec. S 14562-14570 (daily ed. August 25, 1976);
122 Cong. Rec. H 10312-10318 (daily ed. September 16, 1976);
122 Cong. Rec. S 16112-16121 (daily ed. September 17, 1976);
122 Cong. Rec. S 17296-17302 (daily ed. September 30, 1976);
123 Cong. Rec. H 6082-6098 (daily ed. June 17, 1977);
123 Cong. Rec. S 11041-11056 (daily ed. June 29, 1977);
123 Cong. Rec. H 8327-8353 (daily ed. August 2, 1977);
123 Cong. Rec. S 13668-13678 (daily ed. August 4, 1977);

(footnote continued)

ed to judicial review. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court discussed in some detail the nature and applicability of the doctrine of nonjusticiability or the political question doctrine, concluding that "it is the relationship

---

(footnote continued)

123 Cong. Rec. H 10128-10134, 10170 (daily ed. September 27, 1977);
123 Cong. Rec. H 10829-10838 (daily ed. October 12, 1977);
123 Cong. Rec. H 10966-10970 (daily ed. October 13, 1977);
123 Cong. Rec. S 17900-17902 (daily ed. October 27, 1977);
123 Cong. Rec. S 18584-91, S 18621-22 (daily ed. November 3, 1977);
123 Cong. Rec. H 12167-12175 (daily ed. November 3, 1977);
123 Cong. Rec. S 19236-19240 (daily ed. November 29, 1977);
123 Cong. Rec. H 12485-12494 (daily ed. November 29, 1977);
123 Cong. Rec. H 12651-12658 (daily ed. December 6, 1977);
123 Cong. Rec. H 12770-75, H 12929-31 (daily ed. December 7, 1977);
124 Cong. Rec. H 5363, H 5371 (daily ed. June 13, 1978);
124 Cong. Rec. H 10798-10800 (daily ed. September 26, 1978);
124 Cong. Rec. S 16312-16338 (daily ed. September 27, 1978);
124 Cong. Rec. H 11493-97 (daily ed. October 4, 1978);
124 Cong. Rec. H 12468-87, H 12516-20 (daily ed. October 12, 1978);
124 Cong. Rec. H 12969-71 (daily ed. October 14, 1978);
125 Cong. Rec. H 5253-5262 (daily ed. June 27, 1979);
125 Cong. Rec. S 9851-9873 (daily ed. July 19, 1979);
125 Cong. Rec. S 13253-55 (daily ed. September 24, 1979);
125 Cong. Rec. S 13573-75 (daily ed. September 27, 1979);
125 Cong. Rec. S 13736-43 (daily ed. September 28, 1979);
125 Cong. Rec. H 8856-58 (daily ed. October 9, 1979);
125 Cong. Rec. S 14325 (daily ed. October 10, 1979);
125 Cong. Rec. H 9884-86 (daily ed. October 30, 1979);
125 Cong. Rec. S 16710-14 (daily ed. November 15, 1979);
125 Cong. Rec. H 10955-59 (daily ed. November 16, 1979);
125 Cong. Rec. S 16882-83 (daily ed. November 16, 1979);
125 Cong. Rec. H 11614-11623 (daily ed. December 6, 1979);
125 Cong. Rec. H 11770-76 (daily ed. December 11, 1979).

between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the political question." *Baker* v. *Carr*, 369 U.S. at 210. To determine if that doctrine should be invoked, this Court set forth certain guidelines:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherance to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr*, 369 U.S. at 217.

Although the issues presented to this Court here are different from those in *Baker*, which upheld the justiciability of legislative reapportionment, at least some of the "tests" for determining whether to apply the political question doctrine are applicable here and should guide this Court in its review of the judgment of Congress involved in this case.

For example, in this case there is a "textually demonstrable constitutional commitment of the issue" of the appropriations power to Congress, "a coordinate political department" under Article I, §9, cl. 7 of the U.S. Constitution. There is a "lack of judicially discoverable and manageable standards" for determining which, and to what extent, the State can most wisely promote and protect with its limited resources the various and conflicting legitimate

state interests involved in the abortion decision. There is the "impossibility of deciding, without an initial policy determination of a kind clearly for nonjudicial discretion" which of the various conflicting legitimate state interests at stake in abortion should be preserved. There is the "impossibility of undertaking independent resolution" of the issue of whether the courts should promote the health of citizens—if indeed "health" is significantly endangered—rather than other important and legitimate state interests "without expressing lack of respect due coordinate branches of government." Finally, there is the "potentiality of embarrassment from multifarious pronouncements by various departments" (here, from the Congress and the judiciary) "on one question": how various legitimate, perhaps competing, state interests should be promoted with the resources available to the State. Clearly, many of the tests for invocation of the political question doctrine are satisfied here.

Even if the close relationship between this case and "political question" cases does not counsel a finding of nonjusticiability, it certainly counsels judicial restraint, a low level of judicial review, and judicial deference to appropriations decisions of Congress.

This Court has held that the President has no power to impound funds which Congress has expressly directed to be spent. *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). *See also Train* v. *City of New York,* 420 U.S. 35 (1975). Such decisions promote respect for and protect separation of powers and our system of checks and balances. Nothing less is at stake here.

The various demands which the Congress makes upon the Treasury to further and protect valid governmental interests should not be subject to judicial review merely

because an individual physician believes a particular medical procedure is "necessary."

As Mr. Justice Stewart, writing for this Court, stated in *Dandridge* v. *Williams,* 397 U.S. 471, 478 (1969),

> [t]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

IV.

THE HYDE AMENDMENT IS CONSTITUTIONAL

A. The Hyde Amendment Burdens No Fundamental Constitutional Right

1. There is No Due Process Right to Any Governmentally Subsidized Abortion

In *Maher* v. *Roe,* 432 U.S. 469 (1977), this Court held that there exists no due process right to a state subsidized abortion:

> The Constitution imposes no obligation [on the State] to pay the pregnancy related expenses of indigent women, *or indeed to pay any of the medical expenses of indigents.*

Maher v. *Roe,* 432 U.S. at 487 (emphasis added).

Since there exists no due process right to receive government funds for any medical procedure, there can exist no due process right to a governmentally subsidized "medically recommended" abortion.

Nevertheless, the district court found that the Constitution requires the State to further, through the use of public funds, its interest in maternal health in preference to any other interest, or at least in preference to the State's interest in the protection of fetal life. Although the court's

statement of its rationale is obscure, it is at least clear that this supposed constitutional mandate is based on a finding that the Amendment in some fashion unduly burdens an alleged due process right of privacy which encompasses a "medically recommended' abortion. Slip op. at 310, 312.

The district court relies upon several of this Court's prior abortion decisions involving criminal statutes to support its theory that the State is constitutionally required to "prefer" maternal health or it will violate the due process rights of the woman. *See* slip op. at 310, 319-320.

In *Roe* v. *Wade,* this Court held that the State could not penalize abortions performed to preserve maternal health even after fetal viability when the State maintains a compelling interest in fetal life. 410 U.S. at 164. *Danforth* held that Missouri's ban on saline amniocentesis was unconstitutional because, as a practical matter, it caused the physician to employ techniques of abortion less likely to preserve maternal health. 423 U.S. at 79. *Colautti* found a Pennsylvania standard of care statute unconstitutional in an opinion that stressed the need to provide the physician with "broad discretion" in the context of such criminal laws. 439 U.S. at 394. From these decisions the district court concluded that the Constitution "appears to imply that any regulation of abortion must not preclude the physician from using the methods of medical management that preserve the woman's health and life as against fetal life when the interests conflict." Slip op. at 320. Whatever the validity of this conclusion in the context of criminal statutes—and all the decisions cited by the district court concern punitive laws—it can have no application here.

Roe v. *Wade* holds that the boundaries of the woman's zone of privacy are such that they may not be crossed by

the State when a health interest of the woman is asserted, even when there is a compelling interest at stake.[5]

But there "is a basic difference between direct state interference with a protected activity and state encouragment of an alternative activity consonant with State policy." *Maher* v. *Roe,* 432 U.S. at 475. It is one thing for the State to proscribe or penalize performance of an abortion a physician deems necessary. It is quite another thing for the State to encourage the physician through allocation of public funds to employ alternative methods of medical care for the woman in order to preserve both its interest in the protection of fetal life and its interest in maternal health. "There is nothing in the Constitution . . . that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has." *Geduldig* v. *Aiello,* 417 U.S. 484, 496 (1974) (Stewart, J.).

This is not a "right to privacy" case. It does not involve direct state interference in the woman's right to privacy. Like *Maher,* this case involves the disbursal of public funds through a governmental social and economic program to encourage childbirth. Therefore, the principles of this Court's prior decisions involving criminal statutes found to burden or interfere with the exercise of conduct protected by due process do not apply here. The privacy right is a right to be free from unduly burdensome state interference in seeking an abortion. This right is not altered by the reason for which the abortion is sought, whether that reason is purely "elective" or whether it is because the abortion is believed "medically necessary."

---

[5] It is also apparent, however, that the State may at least regulate the manner in which the right is effectuated in such a context. *Planned Parenthood* v. *Danforth,* 423 U.S. at 99-101. *See also Wynn* v. *Scott,* 449 F. Supp. 1302, 1320-1321 (N.D. Ill., three judge court, 1978).

Moreover, since the woman cannot claim a due process right to state support for any abortion decision, neither can her physician. As this Court held in a unanimous opinion:

> The doctors rely on two references to a physician's right to administer medical care in the opinion in *Doe* v. *Bolton,* 410 U.S. at 197-198, and 199. Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in *Doe* was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedure were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. *If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.*

Whalen v. *Roe,* 429 U.S. 589, 604 n.33 (1977)(emphasis added).

Due process requirements of the Constitution create a sphere of privacy within which certain conduct must remain free from state interference. As this Court has held, the right to procure abortion falls within the boundaries of this zone. But as this Court has also held, the freedom or immunity which the Constitution provides for such decisions implies no affirmative state obligation whatever to implement their exercise. In *Whalen,* this Court adopted the view of Professor Philip Kurland that the privacy right is (as here relevant) "the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." Kurland, *The Private* I, 1978 University of Chicago Magazine 7, 8 (Autumn 1978). Quoted in *Whalen* v. *Roe,* 429 U.S. at 599.

Undoubtedly, the government may choose to assist individuals in their exercise of activities which fall within the zone of privacy. *Maher* v. *Roe,* 432 U.S. at 480. Whether or not the government does so, however, is solely a matter for the State to decide in light of its valid interests as the State perceives them to be affected. "Governmental decisions to spend money to improve the public welfare in one way and not another are not confided to the courts." *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976), (Stewart, J.). The *private* interests which might lead an individual to exercise the right to seek abortion—whether an "elective" abortion, a eugenic abortion, or a "medically recommended" abortion—cannot affect consideration of the constitutional validity of such state funding decisions. Such asserted private interests become public interests only by way of the political process. Indeed, this is precisely the purpose for which our legislative institutions were created:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

Dandridge v. *Williams,* 397 U.S. 471, 487 (1970) (Stewart, J.). Such problems are the business of Congress.

The lower court erred insofar as it held that there exists a due process right to any funded abortion which might be claimed by the woman or her physician.

2. The Hyde Amendment Neither Penalizes The Due Process Right to Privacy Nor Creates an Unconstitutional Condition on Its Exercise

Although there clearly exists no due process right to any governmentally subsidized abortion, the district court nevertheless found that the Hyde Amendment unduly burdens the woman's due process right to privacy by creating a penalty or a condition on its exercise:

> To overrule the medical judgment, [of the physician that abortion is "medically necessary"] . . . and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is an unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary. To deny the appropriate medical assistance to the patient in need of medical assistance and remit her to a less appropriate medical course and abandonment of her fundamental right of choice, or else to resignation of medicaid benefits is not called for by *Maher* v. *Roe* and is forbidden by the principle its reaffirms.

Slip op. at 312.

Elsewhere, the district court expressed the same concept more plainly. In its view, the Hyde Amendment imposes a "penalty" on the exercise of a woman's right to privacy because she is "effectively denied assurance of a basic necessity of life (*Memorial Hospital* v. *Maricopa,* 415 U.S. 250, 259 [1974]) because of her medically advised decision." Slip op. at 314.

Both conclusions utterly distort the intent and effect of the Amendment. First, the Hyde Amendment does not "overrule medical judgment." It simply does not provide physicians with reimbursement for having performed certain abortions.

Second, the Hyde Amendment does not "withdraw medical care." It provides that physicians will not be paid for performing a certain procedure. All alternative forms of treatment for any health difficulty encountered by the woman during pregnancy are reimbursed.

Third, the Hyde Amendment does not deny physicians reimbursement because the physician's "recommended course prefers the health of the woman over fetal life" but simply because the operation he proposes involves the destruction of fetal life contrary to valid state interests.

Fourth, the Hyde Amendment does not deny a "basic necessity of life." Abortions necessary to preserve life are funded; alternative medical procedures to preserve health are funded. In any case, the State is under no obligation to provide "the most basic economic needs." *Dandridge* v. *Williams,* 397 U.S. at 485.

It is important to understand the roots of penalty analysis. A penalty is a way of punishing an individual for some act by taking something away from that individual in retribution for the act. A penalty is retribution for, not a failure to assist, a perceived wrong. By definition, a penalty is something over and above thwarting the act penalized. If a physician is denied reimbursement for a fraudulent claim, this merely prevents the success of the fraud. But if a physician is denied eligibility for any future medicaid reimbursement, that is a penalty.

The application to this case is obvious—as *Maher* explicitly declared. The fact that an abortion is "medically necessary" rather than "elective" does not alter the reality that a failure to fund is not a penalty.

The mere "judgment" of a *physician* that an abortion is "recommended" does not logically generate any *state* burden on or interference with his patient's privacy right.

Certainly, the physician-class is nowhere vested by the Constitution with a right to demand taxpayer subsidies for whatever medical procedures it might recommend, much less to dictate through an exercise of "medical judgment" that an Act of Congress be stricken. After all, the Constitution vests authority to legislate for the general welfare in the Congress, not in the physician-class.

If a physician may properly demand reimbursement from the State for any "medically recommended" abortion, then the "professional judgment" of a school teacher that to instruct a student in German is "educationally recommended" would be equally sufficient to oblige the State to pay for such an education. Yet such a line of reasoning has already been specifically rejected by this Court. *Maher* v. *Roe,* 432 U.S. at 476-477. It must likewise be rejected here.

The district court's reliance on *Memorial Hospital* to find a "penalty" here is particularly inappropriate in view of this Court's prior rejection of any analogy to that case or to *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), in the abortion funding context:

> Appellee's reliance on the penalty analysis of *Shapiro* and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.
>
> If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro,* and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers.

Maher v. *Roe,* 432 U.S. at 474-475 n.8.

The district court's logic would require the State "to pay for the bus fares of indigent travelers" whenever a physician believes their relocation is "medically recommended." The private judgment of a physician that either an abortion or relocation is "medically recommended" does not create an obligation on the State where none existed before. There is simply no logical or legal ground to hold that penalty analysis should be applied here when it was not applied in *Maher.*

Moreover, unlike the situations in *Shapiro* and in *Maricopa,* no "general welfare benefits" are denied by the Amendment to any woman who decides to abort upon her physician's recommendation. It is only the abortion procedure itself that the State declines to fund, and this decision is not based upon any animus directed at the woman because she has exercised a fundamental right; it arises out of the special character of a procedure which causes fetal death. In fact, a basic premise of the *Maher* decision was that the State has an important interest in the fetus and may make a value judgment favoring childbirth over abortion. To assume that the failure to provide funds for a woman's abortion is a penalty totally misses the purpose of the Hyde Amendment, which is not to punish but to encourage the positive goal of protecting the important state interest in the fetus.

Like the constitutionally valid California insurance plan which declined to fund pregnancy related disability while providing disability benefits for other reasons upheld in *Geduldig* v. *Aiello,* 417 U.S. 484 (1979), the Hyde Amendment "does not exclude anyone from benefit eligibility because of a characteristic of the individual but merely removes one physical condition . . . from the list of compensable disabilities." *Id.* at 496 n.20. Under the Hyde Amendment, *no* condition—whether pregnancy or medically complicated pregnancy—is excluded from compensation. Rather, only one alternative *treatment* for pregnancy or its complications is excluded. The rationale of *Gedulig* applies with even greater force here.

The sole purpose of the durational residency requirements at issue in both *Shapiro* and *Maricopa County* was to punish an exercise of the fundamental right to interstate travel. As this Court held, "if a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional." *United States* v. *Jackson,* 390 U.S. 570, 581 (1968), quoted in *Shapiro* v. *Thompson,* 394 U.S. at 631 (1968). However, the Hyde Amendment's purpose is not to "chill" the exercise of one fundamental right, but to encourage the exercise of another—the fundamental right to continue to bear and to give birth to a child, and thereby to promote the State's important interest in prenatal human life.

In *Maricopa County,* the durational residency requirement at issue did not provide the affected class with "means to obtain alternative treatment." *Memorial Hospital* v. *Maricopa County,* 415 U.S. at 260-261. But the very purpose of the Hyde Amendment is to encourage use of alternative treatment so that both the State's valid interest in the life of the fetus and its interest in the woman's health

might be furthered. In providing funds for abortion when the mother's life is endangered and providing funds for treatment alternative to abortion in all other situations in which there are pregnancy complications, the government hopes to protect all its interests to the maximum extent.

3. No Due Process Right to Funded Abortion Is Created by The Medicaid System

Although the legal basis for its conclusion is absent, the district court appears to strike the Amendment on Constitutional grounds because, in its view, the woman has a *statutory* entitlement to medical assistance:

> The medicaid eligible woman who is pregnant has a statutory entitlement to medical assistance, and, if her pregnancy becomes a problem pregnancy, her entitlement extends to receiving the medical treatment appropriate to her medical problem, the treatment which is recommended by her attending physician's judgment . . . . Since the recommended abortion is medically necessary to safeguard the pregnant woman's health, and her basic statutory entitlement is to appropriate medical assistance, the disentitlement to medicaid assistance impinges directly on the woman's right to decide, in consultation with her physician and in reliance on his judgment, to terminate her pregnancy in order to preserve her health.

Slip op. at 312-313.

This approach is fundamentally inapposite. The language of "statutory entitlement" is appropriate in the context of *procedural* due process. *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970). But as Mr. Justice Stewart, speaking for this Court, noted in *Richardson* v. *Belska,* 404 U.S. 78, 80-81 (1971) (citations omitted):

> Our decision in *Goldberg* v. *Kelly*, upon which the District Court relied, held that as a matter of procedural due process the interest of a welfare recipient in the continued payment of benefits is sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing. But there is no controversy over procedure in the present case, and the analogy drawn in *Goldberg* between social welfare and "property" cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.

The conceptual basis for according constitutional protection to the process by which governmental benefits are terminated or reduced is that a statutory entitlement constitutes a form of "property." *Goldberg* v. *Kelly*, 397 U.S. at 262 n.8. Once one has a property interest, one cannot be deprived of it by the government without due process of law. But "[p]rotected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez*, 419 U.S. 565, 572-573 (1975) (citation omitted).

Since the statute is the *source* of the constitutionally protected property interest, and since it defines the "dimensions" of that interest, it is conceptually incoherent to "bootstrap" a *substantive* constitutional right to property in benefits which are *not* included in the statute to a *procedural* constitutional right to property in *other* benefits which *are* provided in the statute.

The error of the lower court is to regard the statute as though it had extended some general entitlement to all "medical assistance . . . recommended by [an] attending physician", slip op. at 312-313, and then, once it had done

this, had then unconstitutionally deprived recipients of their property in such assistance by failing to provide funds for certain services. But what the statute in fact does is to extend an entitlement to some, specified medical assistance[6]—assistance which does not include abortions except under particularly described circumstances. Of course, when the legislature sets standards of eligibility and coverage it must comply with the equal protection clause (*see* this Brief at 54 ffl.), but it can hardly be maintained that, once the legislature decides to provide coverage of some items, it thereby creates a property right in all other items which, by any conceivable principle of generalization, might be deemed by a court to come within the same class. If Congress enacts a program providing veterans who have served more than two years with 50% of tuition benefits in vocational training, it does not create a property right in all veterans who have served any length of time to 100% of tuition in four-year liberal arts programs. Yet, such absurd results would be the logical outcome of accepting the lower court's "entitlement" argument in this case.

Even were the authorizing statutes construed specifically to provide coverage for "medically necessary" abortions, that would not create a statutory entitlement as against an appropriations act curtailing funding for such abortions.

---

[6] Even under the broadest reading of the Medicaid Title, that which requires that all "medically necessary" services be funded in certain categories, there are many other categories of treatment which might be "recommended by [an] attending physician" which are purely optional with each state. *See* this Brief at 94, n.27. By no means does the Title provide a "comprehensive" program of services for the medicaid-eligible; indeed, a provision requiring the States to move gradually toward that goal was expressly repealed by the Congress. Act of October 30, 1972, Pub. L. No. 92-603, § 203, 86 Stat. 1410, *repealing* Pub. L. No. 89-97, § 1903(e), 79 Stat. 349 (1965) (*codified in* 42 U.S.C. § 1396b[e]).

The effective existence of the medicaid program depends solely on an allocation of monies by the Congress from year to year, as the Congress deems fit. The program has no other practical reality. A particular individual may properly claim to be within the class of medicaid-eligible recipients under the medicaid statute and that principles of procedural due process apply to prevent her or his exclusion from the class. But under the statute the individual has no property interest, only an "abstract concern," in the *funds* which Congress may or may not annually apply to the program and its purposes. *See Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 576-578 (1972). There is no guarantee in the medicaid program that the Congress will supply funds for any particular purpose—or indeed, any funds at all for any purpose which might fall within the parameters of the program. *Cf. Board of Regents* v. *Roth,* 408 U.S. at 578 n.16. The individual eligible recipient can assert no legitimate claim of entitlement to funds as against Congress when, whatever the character of the authorizing statute, the Congress has reserved to itself the sole power to allocate funds under the statute as the Congress deems appropriate. Otherwise, solely by virtue of the existence of any authorizing statute, any person who maintained a property interest in his status as a potential recipient could demand that funds be allocated for any and all purposes that might arguably fall within the intent of an authorizing statute. Such a circumstance would be absurd in a system of government which vests the legislature with authority to disburse limited public funds. Indeed, carried to its logical extreme, such a theory would revoke the authority of legislatures to repeal or amend previously passed legislation without undergoing judicial scrutiny of the strength and validity of their interests in doing so.

The medicaid program is not a public forum[7] like the streets or parks (for which *see, e.g., Jamison* v. *Texas,* 318 U.S. 413 [1943]) or even a library, *see Brown* v. *Louisiana,* 383 U.S. 131 (1966); there is no right of minimum access

---

[7] Apart from areas in which the government exercises a legal monopoly, *see, e.g., Boddie* v. *Connecticut,* 401 U.S. 371 (1971), the public forum cases are the only ones in which, when state interference is not present, it can be plausibly argued that affirmative obligations to make something available are imposed on the government.

These cases rest both on the special character of the traditional "public forums"—public streets and parks—and on the particular nature of the speech and assembly First Amendment freedoms.

The streets and parks have traditionally been regarded as being held in common for the use of the public—maintained and perhaps constructed by the government, but used by the people as individuals:

> Wherever the title of streets and parks may vest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated . . . but it must not, in the guise of regulation, be abridged or denied.

Hague v. *C.I.O.,* 307 U.S. 496, 515-516 (1939) (plurality opinion) (dictum), adopted by the majority of the Court in *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 152 (1969).

Insofar as public forum access rights have been extended beyond open public places to include public buildings and the like, such access has been accorded not by the mere creation of any facility, but only by its deliberate use as a place for this exchange of views among the public. *See Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 549 n.4 (1976).

This also points up the special nature of First Amendment expression rights. They are crucial to the maintenance of our democratic form of government and the integrity of the political process; de-

(footnote continued)

It is a pool of money intended to assist a particular class of people in certain ways designated by law rather than to provide the general public with a supply of funds to be used at its discretion. For the district court to have found that each category of treatment which can be funded under the program must be funded under the Constitution was equivalent to holding that, if the government constructs a library, the State must not only provide each member of the general public with access to the library, but must purchase any book for that library which any person might desire to read. Although this Court has held that the government may not exclude those who wish to exercise the prerogatives of free speech from a public forum, it has never held that the government must provide a loudspeaker in order that they may effectively evercise their right in the forum. The Court has never held that in constructing

(footnote continued)

signed tc provide the opportunity to persuade, they are inherently *public* in nature.

By contrast, the right to abortion is a privacy right. The "right to privacy" generally attaches to intimate relationship. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (parent and child); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (husband and wife); *Roe* v. *Wade*, 410 U.S. 113 (1973) (physician and patient). The State is forbidden from interfering with privacy rights precisely because a *private* forum which such relational interests form has been acknowledged under the Constitution. But to claim that those who wish to exercise rights to *privacy* may demand the same access to public means to implement their exercise as those who would exercise rights which presume the existence of a public forum overlooks both the peculiar importance of free speech as a public means of effecting popular self-government and the "non-interference" nature of privacy rights. Activities protected as rights of privacy cease to be "rights" at all when exercised outside the zones of immunity that the Constitution provides for them. *Cf. Stanley* v. *Georgia*, 394 U.S. 557 (1969) with *United States* v. *Orito*, 413 U.S. 123 (1973). Hence, there can exist no substantive right to any public assistance to effectuate activities attendant to rights of privacy.

a park, the government must build a speaker's platform. Still less has it held that, when planning such a park, the government must make provision for a baseball field or swimming pool on any theory that, once the government has entered the recreation arena, it must "ensure access" for all recreational uses.

In sum, there is no independent constitutional right to a funded abortion. Nor is such a right somehow created by a governmental decision to fund some, many, or even most medical expenses of the poor, so long as principles of equal protection are not violated. There is no Due Process Right to a funded abortion.

4. The Hyde Amendment Does Not Inhibit the Free Exercise of Religion

The district court held the Hyde Amendment unconstitutional under the First Amendment based on its finding that certain religions make abortion a matter of "responsible personal decision" under conditions which include, but are not limited to, circumstances where abortion is perceived to be in the interests of the mother's health.[8] Slip op. at 326-327. Since the Hyde Amendment does not provide public funds to implement the exercise of a religiously motivated decision to procure an abortion perceived to be necessary to secure maternal health, the district court found that it violated the "liberty protected by the First Amendment" to freely exercise religion. Slip op. at 328.

First, the district court erred by holding that the protection of the Free Exercise Clause extends to abortion decisions merely because they are reached under a perceived religious duty to make important personal decisions con-

[8] It does not necessarily follow that the mother's health would be adversely affected by continued pregnancy because the child is handicapped or because the pregnancy arose from rape or incest.

scientiously. Some witnesses testified that some abortions under some circumstances are permissible, even salutory, if the woman's decision is well-considered and conscientious.[9] That is, some religions require their members to follow their consciences and, if a woman herself decides she ought to have an abortion and does so conscientiously, she ought to conform her conduct to that decision. But to vest such conscientious but individual decisions with the full panoply of First Amendment free exercise rights when they are not mandated by specific and affirmative corporate tenets of some religious group would be to revo-

[9] The district court's apparent finding that branches of Judaism "mandate" abortion in order to secure maternal health, slip op. at 327, is contrary to the evidence. Rabbi David Feldman, witness of the plaintiffs below, appeared to testify at several points that some Reformed and Conservative authorities hold that abortion is "mandated" when done to preserve "health" and for a variety of other reasons, but finally concluded that these authorities actually hold that it is the "woman's decision" which is "absolute":

> Q. Now, based on the variety of teachings that you have described, can a rabbi affirmatively counsel a woman to have an abortion?
>
> A. Yes, he can and he does, and in certain cases, he should. But, of course, she is the final arbiter. She makes the final decision.
>
> Q. Are there any circumstances in which a rabbi could prevent a woman from having an abortion, for example, if he disagreed with her reasons?
>
> A. No, she makes the final decision.
>
> Q. So is it fair to say that Jewish law mandates an absolute respect for the woman's decision?
>
> A. It would seem so. Her welfare is primary and her statement of her welfare is primary.

T. at 1875-1876.

Since the woman's decision is "final" and that decision—whatever it might be—is honored by such religious authorities, it is simply illogical to characterize the effectuation of any such decision whether to procure abortion or not as "mandatory."

lutionize traditional First Amendment interpretation. Any and every decision by an individual who adheres to a religion would require a compelling interest on the part of the government before it could thwart or even "unduly burden" any action by the individual taken in accord with that decision.

But even if such decisions were brought under First Amendment free exercise protection, it would not follow that the government must fashion its public policy to conform with them. *See Gillette* v. *United States,* 401 U.S. 437, 457, 461-462 (1971), which held that the State is not obliged to provide any exception for conscientious objectors, and that drafting of religiously motivated selective conscientious objectors does not violate the Free Exercise Clause. Similarly, the State is not obliged to provide funds for abortion merely because the decision to abort is made in good conscience informed by religious authorities.[10]

[10] The district court relies upon *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), and *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), to support its conclusion that religiously conscientious abortion decisions "exact the legislative tolerance that the First Amendment assures." Slip op. at 327-328.

Unlike the state action in *Yoder* and *Barnette,* however, there is here no state imposed penalty or general disability against indigents for procuring abortion. The litigants in *Yoder* and *Barnette* sought relief from state requirements that students be required to attend secondary school and to salute the flag with a pledge of allegiance. Here, the plaintiffs seek state support to facilitate the exercise of their religious beliefs. Under the theory proposed by the district court, the Amish parents of *Yoder* could claim not only that the Free Exercise Clause exempts their children from secondary education, but that it requires the State to pay for the agricultural education their religion prefers. *But cf. Maher* v. *Roe,* 432 U.S. at 467-77.

(footnote continued)

Indeed, to the extent that abortion may be a religious practice—as the district court appears to hold it is for some—the State is positively forbidden to provide funds to facilitate its effectuation. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1972); *Tilton* v. *Richardson,* 403 U.S. 672 (1971); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Clearly, the Constitution does not require the State to violate the Establishment Clause in order to facilitate the free exercise claims of its citizens.[11]

(footnote continued)

There is no evidence in the record to demonstrate that the apparent permissive attitude of some religions toward abortion for reasons other than to preserve maternal life either occupies a central place in the practice or doctrine of these religions or represents a consistent or long-standing tradition or belief. To analogize the positions on abortion of these religious bodies to the traditional educational practices of the Amish is, therefore, fundamentally inappropriate. *Cf. Wisconsin* v. *Yoder,* 406 U.S. at 209-212.

[11] The district court implies, slip op. at 328, that the Amendment constitutes a penalty on the exercise of the claimed free exercise rights of indigent clients analogous to the state refusal to provide unemployment compensation benefits to the Seventh Day Adventist who refused to work on Saturdays in *Sherbert* v. *Verner,* 374 U.S. 398 (1963). *But see Maher* v. *Roe,* 432 U.S. at 475 n.8.

In *Sherbert,* this Court held that "appellant's declared ineligibility for benefits derives solely from her practice of religion." *Sherbert* v. *Verner,* 374 U.S. at 404. But for the *Sherbert* appellant's religious belief she would have been eligible for unemployment funds; here no one is eligible for funds for abortion—regardless of her religious persuasion—since Congress has not appropriated any funds for the purpose of obtaining abortions. Thus, the Hyde Amendment does not discriminate between persons based on religious belief, though such discrimination was an important factor in *Sherbert.* 374 U.S. at 406.

The *Sherbert* appellant did not claim that a penalty or condition had been placed upon her free exercise of religion because the State had failed to fund transportation to her church. But if abortion is a religious exercise, that would be the precise analogy.

Furthermore, even if such decisions to abort might properly be vested with the protection of the First Amendment, the proper relief would be to fashion an exemption for bona fide members of those religious organizations which mandate abortion, not to strike the Hyde Amendment entirely. In *Wisconsin* v. *Yoder,* the Court did not declare public education to be unconstitutional; it held that the Amish could not be compelled to participate in it.

The district court's finding that refusal to pay for effectuation of abortion decisions made under the aegis of religion constitutes a violation of the First Amendment is contrary to the decisions of this Court and of lower courts. *Akron Center for Reproductive Health, Inc.* v. *City of Akron,* 479 F. Supp. 1172, 1188-1195 (N.D. Ohio, 1979); *Womens Services* v. *Thone,* 48 U.S.L.W. 2392 (D. Neb., Nov. 11, 1979); *Right to Choose* v. *Byrne,* 398 A.2d 587, 595-597 (N.J. Super. 1979); *Woe* v. *Califano,* 460 F.Supp. 234, 236-237 (S.D. Ohio, 1978).

It must be reversed.

5. Summary: The Hyde Amendment Does Not Burden the Exercise of Any Fundamental Right

In summary, the Hyde Amendment creates no condition or penalty and imposes no burden on the woman's fundamental constitutional right to procure a "medically recommended" abortion. Thus, it does not violate the "due process" clause of the Fifth Amendment. Furthermore, analysis has shown that the Hyde Amendment does not impinge upon any fundamental right explicitly or implicitly protected by the Constitution. Therefore, under equal protection analysis, neither strict scrutiny nor any other form of heightened judicial review is applicable. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973). The district court's decision that the Hyde Amendment merits

such scrutiny or review is illogical and finds no support in this Court's prior decisions. The district court's decision must be reversed.

B. Equal Protection of Law It Not Denied by the Amendment

1. The Hyde Amendment Discriminates Against No Suspect Classes

Under standard equal protection analysis, the Hyde Amendment may be subjected to strict judicial scrutiny only if it burdens the exercise of a fundamental right or discriminates against a suspect class. *Maher* v. *Roe,* 432 U.S. at 470. As the preceding sections have shown, no right is burdened for the purposes of due process analysis, and therefore, there can be no fundamental right burdened for the purposes of equal protection analysis.

However, the district court held that the Amendment operated to the disadvantage of a "suspect class:" the "statutory class of adolescents at a high risk of pregnancy as defined in 42 U.S.C. §300a-21(a)." Slip op. at 315. This conclusion was wrong.

Nowhere did the court show that such adolescents might properly be denominated a "suspect class" for the purpose of equal protection analysis under the criteria this Court has established. *See San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 28 (1973); *Johnson* v. *Robison,* 415 U.S. 361, 375 n.14 (1974). Rather, the court decided that pregnant adolescents should be designated a suspect class because they are "disadvantaged" by pregnancy and are "recognized as such by Congress" through the Adolescent Pregnancies Subchapter, 42 U.S.C. §300a-21 *et seq.* (1974-1978 Supp.). Slip op. at 315. Thus, legislative recognition of particular needs an adolescent might have should

she become pregnant is judged to create a suspect class under the Constitution. One statute is then deemed unconstitutional because of the intent expressed in another.[12]

Clearly, a group of individuals does not become a constitutionally suspect class in one context merely because the Congress has established a welfare program for their benefit in another. Otherwise, for example, the many federal programs created to assist the aged or veterans because they are deemed disadvantaged as a result of advanced years or time spent in military service would be sufficient to designate their classes as "suspect." Indeed, the entire class of indigents would become "suspect" under the district court's theory in view of the many federal programs established to satisfy their needs. *But see Maher* v. *Roe,* 432 U.S. at 471.

Regardless of the particular status of pregnant adolescents under the Constitution, there exists no ground on which to declare the Hyde Amendment unconstitutional on account of some special discrimination it imposes on them. Pregnant adolescents are not singled out for special treatment under the Hyde Amendment; the Amendment applies to *all* potential beneficiaries of federal medical assistance.

---

[12] 42 U.S.C. §300a-21 (a), the statement of intent of the Adolescent Pregnancies Subchapter, does indicate congressional concern over a "higher percentage of pregnancy and childbirth complication" for the adolescents, but nowhere mentions abortion as a means of solving this problem. It was the intent of this law to "encourage the development of . . . services . . . in order to prevent unwanted early and repeat pregnancies . . . ," not to terminate them.

The Adolescent Pregnancies Subchapter is as much concerned with providing proper care for the fetus as for the adolescent, expressing particular interest in the "low-birth-weight babies," their "developmental disabilities," and the higher rates of "infant mortality and morbidity" associated with adolescent pregnancy. As such, this subchapter is hardly an appropriate vehicle for declaring federal restrictions on abortion payments unconstitutional.

Since the Constitution does not command the Congress to treat any class preferentially—whether "suspect" or not —the Amendment cannot be stricken on equal protection grounds for failure to provide pregnant adolescents with special abortion benefits. Furthermore, since nearly every piece of legislation which is subjected to strict scrutiny review has been invalidated by this Court, a declaration that juveniles are a suspect class would no doubt lead to many undesirable results: invalidating curfews, drinking laws, requirements to attend school, marriage requirements, juvenile codes.

It is settled that no other suspect class is the subject of discrimination when funding is limited for abortions. "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized . . . [T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." *Maher* v. *Roe,* 432 U.S. at 470-471.

Since no fundamental right is burdened and since no suspect class is created by the Hyde Amendment, strict scrutiny is not required, and the "rational relationship" test is applicable.

2. The Hyde Amendment Is Rationally Related to the Valid State Interest in the Protection of the Fetus

The district court found that the Amendment could not be "sustained under the les demanding rationality test", slip op. at 316, on the grounds that:

> The purposes of the enactments in question that would be inferred from consideration of the debates in Congress would not be constitutionally permissible: the dominant purpose inferable was to prevent exercise of the right to decide to terminate pregnancy, to prevent the funds of taxpayers who disapproved of abortion on moral grounds from being used to finance abortions that were abhorrent to them. No purpose of encouraging normal childbirth was discussed, and no such demographic consideration as the Court suggested in *Maher,* 432 U.S. at 478 n.11, entered into the debates —except in the form of the argument suggesting that the pro-choice position on medicaid had in it elements of an unthinkable "final solution" for poverty.

Slip op. at 319-320.[13]

Curiously, the district court itself then described what it found to be the actual purpose of the Amendment: to prefer the "life of the fetus" except "in the life-for-life case reflected in the life endangerment exception." Slip op. at 319.[14] Yet, as this Court held in *Maher* v. *Roe,* 432

---

[13] The court also found that the 1978 and 1979 Amendments were irrational because they failed to include exceptions for severe and long-lasting psychological harms, whereas exceptions for severe and long-lasting physical harm were included. Slip op. at 321-322. Since the current Hyde Amendment contains no such exception the issue is moot and will not be discussed.

The rape and incest exceptions in the present Hyde Amendment did not form a basis for the district court's holding of unconstitutionality.

Apparently, the district court concluded that the Hyde Amendment is also unconstitutional for failure to permit the abortion of handicapped children because it "appears to impose a restriction that did not apply" before *Roe* v. *Wade* (slip op. at 322). In fact, such abortions were clearly illegal in most States before *Roe*. *See* this Brief at 100 n.33. The lower court did not explain why or how, if its conclusion were true, this would render the Hyde Amendment irrational.

[14] The court evidently wished to make facile distinctions between the expressed interest of Congress in the protection of the fetus, prevention of the exercise of the right to terminate pregnancy, prevention of taxpayers' funds from being forced to finance abortions morally abhorent to them, and the encouragement of "normal child-

(footnote continued)

U.S. at 478, 478 n.11, protection of the fetus is a perfectly valid governmental interest, and an interest which fully justifies abortion funding restrictions. Moreover, there is no doubt that the Amendment is rationally related to the legitimate governmental interest in protection of the fetus.[15] *See* this Brief at 91-92. It is therefore valid under

(footnote continued)

birth." But Congress could not "prevent" the exercise of the woman's right through the Amendment; it could merely encourage those who receive government funding to carry their children to term. Termination of pregnancy—"childbirth"—is "normal" when it is not intended to cause fetal death. If Congress wished to protect the fetus—which the district court finds that it did—then it also wished to encourage "normal childbirth." The distinctions the district court drew are merely semantic.

Moreover, in *Maher* v. *Roe*, 432 U.S. at 474, this Court held that the State could "make a value judgment favoring *childbirth* over abortion and . . . implement that judgment by the allocation of public funds." (Emphasis added.) The qualifying adjective "normal" was not used. Thus, the claim by a physician that complications may make a particular pregnancy and childbirth other than "normal" in no way reduces the legitimacy of the State's interest prefering childbirth over abortion.

[15] The Hyde Amendment also rationally relates to the government's valid interest in the recognition of one moral precept of the American people. One of the reasons articulated in support of the Amendment was to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. For example, Senator James Buckley, in support of the Hyde Amendment, stated that Congress should not permit federal funds to be disbursed for a "procedure that appalls the conscience of a very substantial percentage of the American taxpayers." 122 Cong. Rec. 20410 (1976). Senator Bartlett said, "I just do not think . . . we should feel we have a right or an obligation to finance abortions, which are simply considered an anathema by many, many people in this country." 122 Cong. Rec. 27679 (1976). Respect for the consciences and moral precepts of its citizens has always been considered a legitimate end of state.

the rationality test. *San Antonio School District* v. *Rodriguez*, 397 U.S. 471, 489 (1969). *See also Maher* v. *Roe*, 432 U.S. at 479-480. Obviously, the district court's finding that the Hyde Amendment fails the rational basis test does not arise out of the usual principles of equal protection analysis. Rather, it is based on the theory that the State's valid interest in protection of the fetus becomes "insufficient" when it "conflicts" with its interest in maternal health.

The district court first erred when it sought to characterize the effect of the Hyde Amendment as placing the government's interest in protection of fetal life in direct and inevitable opposition to its interest in maternal health. Since effective medical services other than abortion continue to be provided, the Hyde Amendment, by encouraging medicaid recipients to employ these alternate forms of treatment, effectively serves both the State's interest in fetal life and its interest in maternal health.

The most that can be said about the illusory "conflict of state interests" which the district court claims is generated by the Hyde Amendment is that the Amendment has the effect of discouraging the physician from performing a procedure—abortion—which he "prefers" or would recommend." Slip op. at 312. If there exists a conflict of interests in this context, it therefore arises out of the physician's disagreement with the manner in which the government has balanced its interests, not as the result of any inherent conflict between governmental interests in maternal health and in fetal life. Such a "disagreement" is properly resolved through democratic process; it has no constitutional significance. As Mr. Justice Stewart, speaking for this Court, has stated, "Governmental decisions to spend money to improve the general welfare in

one way and not another are not confided to the courts." *Mathews* v. *DeCastro,* 429 U.S. 181, 185 (1976). Thus, even if a conflict between the government's interest in fetal life and its interest in maternal health were actually created by the Hyde Amendment, the balance to be made between these interests in a state's social and economic programs would be a legislative, not a judicial matter. A Congressional decision to spend money "in one way" (to protect fetal life) and "not another" (to further maternal health) in order to further its valid interest in fetal life was not a proper concern of the district court. The Constitution does not command the government to prefer one valid interest over the other; it only forbids the government to serve illegitimate interests.

The declaration by the district court that, on balance, the United States must further its interest in maternal health above its interest in fetal life, or it will violate the Constitution, tends to corrupt the nature of a system of government which allocates the function of balancing public interests to the Congress. Courts must not "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass law." *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 (1963). This substitution is precisely what the district court did in its decision.[16]

---

[16] The court relies on *White* v. *Beal,* 555 F.2d 1146 (3rd Cir. 1977), and the statutory analysis section of *Pre-Term* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979), to support its argument that the Amendment is constitutionally irrational, although both involve only statutory construction of Title XIX. Slip op. at 317, 321. Whatever the validity of these decisions as interpretations of the requirements imposed on the States by the Medicaid Title (*see* this Brief

(footnote continued)

The Constitution does not declare that social and economic programs must fail the rationality test merely because, in an effort to further some other legitimate state interest, the State fails to reimburse the physician for some procedure he believes is medically recommended. If, as the district court appears to hold, slip op. at 319-320, this Court's prior abortion decisions mean that the State's interest in protecting the fetus somehow becomes irrational whenever it is perceived to "conflict" with the government's interest in maternal health, then there is no basis by which any other legitimate state interest can survive the same test. Suppose that the government refused to reimburse a certain kind of abortion procedure because it cost too much. Clearly, the valid fiscal interest of the State expressed by such a refusal would not become "insufficient" when it "conflicts" with a physician's medically recommended course of treatment. The government's interest in the fetus at stake in the present context is no less legitimate than the government's fiscal interest which would be asserted if abortion subsidies were reduced for excessive cost.

Moreover, there can be no logically defensible way to restrict the district court's principle of "maternal health primacy" to the immediate context of the Medicaid Title.

(footnote continued)

at 90) the objectives and norms of the Social Security Act have not been incorporated into the Constitution. Exceptions in a statute pass the rational test required by our Constitution if they rationally relate to a valid state interest, regardless of what other interests the general statute purports to serve. "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Geduldig* v. *Aiello,* 417 U.S. at 495.

If there is an asserted need for public hospitals, does it become unconstitutional for the State to build public schools instead? It would seem so for, under the district court's finding, the nature of the government's interest in health causes conflicting interests to become "insufficient." Slip op. at 313. Therefore, to construct schools instead of hospitals would be constitutionally irrational since such a legislative choice would prefer the education of children to the health of the population.

The Constitution informs us when the government is forbidden to further its interests by obstructing the individual rights of its citizens; it does not inform us which of its various legitimate interests the government must advance through the use of public funds. The latter function has been assigned by the Constitution to the Congress and to the democratic process:

> The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge v. *Williams*, 397 U.S. at 487.

Underlying the lower court's usurpation of the legislative power is the notion that Congress is constitutionally required to adopt a posture of "neutrality" toward private decisions to use any form of medical treatment a physician may recommend for a pregnant woman, so that the government must provide funds for *any* solution the physician offers to remedy a pregnancy related complication. Slip op. at 327. The State may not encourage one course of conduct over any other because this would upset the "mathematical nicety" which this ideology demands.

But abortion and childbearing are not merely two sides of the same coin. That view finds no support in our tradi-

tion,[17] and it is not imposed by the Constitution. "A woman has *at least* an equal right to choose to carry her fetus to term as to choose to abort it. Indeed, the right of procreation without state interference has long been recog-

---

[17] Federal efforts to support the health needs of pregnant women and their children before and immediately after birth date as far back as 1912, more than fifty years before the advent of Medicare and Medicaid.

Congress established the Children's Bureau in 1912. Pub. L. No. 116, 37 Stat. 79 (1912). The Bureau's purpose was to investigate the social and economic conditions of children. K. Davis & C. Schoen, *Health and the War on Poverty: A Ten-Year Appraisal* (1978). As a result of this study, and in an effort to reduce infant mortality, the Bureau published a series of pamphlets on the care of children, beginning with prenatal care. Lathrop, *The Federal Children's Bureau: Some Aspects of Its Present Work*, 20 Case and Comment 176 (1929). In response to the increase in maternal and infant mortality reported by the Children's Bureau in 1919, the "Sheppard-Towner Bill" was proposed to promote the welfare and hygiene of infants before and after birth, regardless of the income status of their parents. Davis & Schoen, *supra* at 122.

Protection of infant health was also recognized by many states. Thirty-five already had departments of child health or welfare in 1919. Boldt, *A National Program for Maternity Aid*, 11 Am. Lab. Leg. Rev. 61 (1921). In 1920, the Massachusetts legislature organized a commission to study childbirth and recommended protective legislation. Beard, *Progress Toward Maternity Benefits in Massachusetts*, 11 Am. Lab. Leg. Rev. 66 (1921). The commission emphasized the importance of prenatal, obstetric, and postnatal nursing visits for *all* pregnant women. *Id.* The State of New York mailed pamphlets on prenatal care and childbirth to all newlyweds. Sobel, *Need for Protecting Maternity and Infancy*, 11 Am. Lab. Leg. Rev. 74 (1921).

The Sheppard-Tower Bill was passed by Congress in 1921, creating the Board of Maternity and Infant Hygiene. The stated purpose of the Act was to "promote the welfare and hygiene of maternity and infancy." Maternity and Infancy Act of 1921, Pub. L. No. 135, 42 Stat. 224 (1921). Some states passed enabling legislation immedi-

(footnote continued)

nized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.' *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942)." *Maher*

(footnote continued)

ately, and all but five states followed. Davie, *The Open Door to Maternity Protection,* 11 Am. Lab. Leg. Rev. 311 (1921).

Maternal and child health services were incorporated in Title V of the Social Security Act in 1935, under administration of the Children's Bureau. Davis & Schoen, *supra,* at 122. The stated purpose of the Act was to "(enable) each State to extend and improve, as far as practicable under the conditions in such State, services for promoting the health of mothers and children. . . ." Social Security Act of 1935, ch. 531, Title V, §505, 49 Stat. 629 (1935). The national interest in childbirth and concern for maternal and infant health is evident from the fact that within nine months all states were participating in the program. Davis & Schoen, *supra,* at 123.

During World War II, Congress appropriated emergency funds for maternity and infant care for wives and babies of the lowest paid servicemen. *Id.* The 1963 amendment to Title V was designed to provide adequate prenatal care to lower the risk of mental retardation and infant mortality. *Id.* at 124. It appropriated funds for maternity and infant care projects aimed at reaching women early in pregnancy, continuing through childbirth and the postpartum period. Morehead, *Comparisons Between OEO Neighborhood Health Centers and Other Health Care Providers of Ratings of the Quality of Health Care,* 61 Am. J. Publ. Health 1294 (1971).

A further amendment to Title V in 1967 broadened the maternity and infant care projects. 6 Welfare in Rev. 1 (1968). In approving the amendment, the Senate set out provisions to "improve programs relating to the health of mothers and children." S. Rep. No. 744, 90th Cong., 1st Sess. 1, 6, *reprinted in* 1967 *U.S. Code Cong & Ad. News* 2834, 2839. President Johnson spoke of the national interest in protecting childbirth, recommending that the project reduce the "handicapping conditions caused by complications associated with childbearing and help to reduce infant and maternal mortality." 6 Welfare in Rev. at 31.

None of these programs contemplated abortion as a solution to maternal health problems; all were directed at preserving the life and health of the infant, before and after birth, together with the mother's health.

v. *Roe,* 432 U.S. at 472 n.7. The same can hardly be said of abortion.

The district court erred by attributing to this Court's prior decisions involving the scope of the right to privacy in the content of criminal legislation the principle that the State may not, when alloting public funds, assert an interest in the protection of fetal life when its interest in maternal health is present. It erred in finding that the Hyde Amendment creates a conflict between the government's interest in maternal health and its interest in the fetus. It erred in arrogating to itself the power to override the balance of legitimate state interests struck by the Hyde Amendment.

"This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the . . . distribution of economic benefits." *Idaho Dept. of Employment* v. *Smith,* 424 U.S. 100, 101 (1977). It should do so again; it should reverse the district court.

V.

LIMITATION OF ABORTION FUNDING IS VALID UNDER TITLE XIX

This section deals with the technical aspects of the Medicaid Act and its administrative regulations, state obligations under this Act and congressional intentions concerning medicaid and the funding of abortions. Of paramount importance, however, is that every time Congress has dealt with the question of funding abortion, it has clearly and without equivocation expressed its view that:

1) abortions except under limited circumstances shall not be funded or supported with federal funds, and

2) that the States are free, pursuant to their democratic processes, to decide not to fund abortions.

Also of paramount importance, and not to be forgotten, is that abortion was criminal at the time of the passage of the Medicaid Act and that there has never been an Act of Congress which explicitly or implicitly suggested a congressional intent to fund abortion, except under certain limited circumstances as set forth in the Hyde Amendment. (Indeed, the only congressional decision to fund any abortions at all were expressed in the language of the various Hyde Amendments.) Congress has consistently expressed a contrary intention, by repeatedly voting against funding abortions.

Title XIX is legislation intended to *enable* the several States to provide medical care for indigents, as the statement of the Title's intent makes clear. 42 U.S.C. §1396 (1976). It is not intended to "drive the state legislatures under the whip of economic pressure." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 587 (1937). The operation of the Title is "not constraint, but the creation of a larger freedom, the states and the nation joining in a cooperative endeavor to avert a common evil." *Id.* The purpose of the Social Security Act as a whole is to encourage the States to provide funding for services by providing federal funds when services are funded. *Id.* at 588. To hold that the Title requires the States to encourage conduct contrary to their interest in the fetus, especially when the federal government in agreement with that interest has specifically refused to provide funds for an activity which undermines that state interest, would pervert the intent of this program of cooperative federalism. "The Social Security Act is an attempt to find a method by which all these [federal and state] public agencies may work together to a common end." *Steward Machine Co.* v. *Davis*, 301 U.S. at 588.

It is vital to remember throughout that what transcends the technicalities is the requirement of faithfulness to

public policy and the intent of the legislature, which—as consistently articulated by the Congress—are unquestionably opposed to funding all but a small number of specified abortions.

A. This Court's Holding in Beal that States May Specify What They Will Fund in Their Medicaid Plans So Long as Such Specifications Are Reasonable and Consistent With the Objectives of the Act Was and Is Correct

In ruling that the mandatory standard the Medicaid Title establishes for the inclusion of services in each state plan is that all "medically necessary" services must be covered, slip op. at 294-5, the lower court directly contravened the explicit holding of this Court in *Beal* v. *Doe*, 432 U.S. 438, 444 (1977):

> [N]othing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care. . . . [T]he statute . . . confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be "reasonable" and "consistent with the objectives" of the Act.

The first issue, therefore, is whether *Beal* should be reversed insofar as it establishes the standard for analyzing the validity of state scope of benefit determinations, and replaced with a standard which demands that the States must cover any and all services which a physician states are "medically necessary" within the five mandatory categories. This question is treated in this section, A.

Assuming that the *Beal* standard is not reversed, the second issue is whether the Hyde Amendment limitations on abortion funding are "reasonable" and "consistent

with the objectives'' of the Act. This question is treated in B.

In the alternative, assuming that the *Beal* standard is replaced with a ''medical necessity'' standard, the third issue is whether abortion is unique in a manner which permits special funding limitations concerning it. This question is treated in C.

''The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself.'' *Lewis* v. *United States,* 48 U.S.L.W. 4205, 4207 (1980). The court below cites 42 U.S.C. § 1396a(17) (1976) for the proposition that ''the state plans of medical assistance must include reasonable standards for determining eligibility—need—and the extent of medical assistance—necessary medical care.'' Slip op. at 294. This is flatly wrong. §1396a(17) contains no reference to ''necessary medical care'' or its equivalent. It states, ''A state plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this Title. . . .'' The material here omitted (as indicated by the ellipses) relates to specifications relevant only to eligibility standards; even among those, there is no reference to ''necessary medical care,'' ''necessary medical services,'' or the like, anywhere in §1396a(17).

1. No Requirement to Fund "Medically Necessary" Services Is Expressed in the Act

There are only two references to ''necessary medical services'' in the entire Title. One is in the Preamble to Title XIX, the medicaid section of the Social Security Act, 42 U.S.C. §1396 (1970), which states the general intent of Congress:

> [F]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services . . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

The stated general purpose of medicaid is thus to provide ''medical assistance'' to those who cannot afford ''necessary medical services.'' As is appropriate to a Preamble, it does not detail the nature or extent of the ''medical assistance'' to be provided: that is left to the substantive provisions of the Title. The Preamble does not require that all ''medically necessary'' services be funded. The phrase ''necessary medical services'' does not refer to the nature of the medical assistance to be provided under medicaid, but is merely used as an element in the general description of the class of individuals to whom the assistance is to be provided.

It is vital to recognize the difference between provisions in the Title relating to eligibility for benefits and those dealing with the extent of benefits. The eligibility provisions determine who can receive assistance; the extent of benefits provisions determine what it is they can receive. The two are wholly separate questions, and regulations or portions of the Title designed to deal with one of these aspects must not be mistakenly construed to set standards for the other.

It is apparent on the face of the statute that the phrase ''necessary medical services'' of the Preamble deals with *who* the Title affects (people unable to afford necessary medical services) and not with *what* the Title is to provide them. To designate what services are to be provided, the

text of the Preamble employs the more open-ended term "medical assistance."

In *Pre-term* v. *Dukakis,* 591 F.2d 121, 124 (1st Cir. 1979), the First Circuit noted, "It does not seem . . . that the words 'necessary medical services' are properly read as a substantive requirement imposed on the states. Instead this section merely specifies for whose benefit federal funds are to be appropriated—those 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' " Earlier, the Second Circuit had drawn the same conclusion:

> [T]he phrase ["medically necessary services"] is used to describe persons eligible for "medical assistance" as those who are "unable to meet the costs of necessary medical * * * services." Sections 1396 and 1396a(10)(C)(i). As the opinion below points out, 380 F.Supp. [726], 728-729, the phrase appears in Title XIX
>
> "only as a limitation of *persons* eligible for Medicaid payments. * * * [T]he assistance to be made available to those who are eligible is always described simply as 'medical assistance' without the adjective 'necessary.' *See, e.g.,* 42 U.S.C. §§1396, 1396a(a), 1396a(a)(10). In particular, the detailed statutory definition of 'medical assistance,' 42 U.S.C. §1396d, contains no reference to medical necessity * * *."
>
> The broad classifications of the types of care and services authorized by §1396d do not include a "medical necessity" requirement. . . . We find no such requirement elsewhere in the statute.

Roe v. *Norton,* 522 F.2d 928, 933 (2d Cir. 1975) (emphasis in original).

In 1978, this Court handed down an opinion highly instructive about the breadth of state discretion in a similar program of "cooperative federalism." *Quern* v. *Manley,* 436 U.S. 725 (1978). The case concerned Title IV-A of the Social Security Act, which contains broad language authorizing wide eligibility for the Emergency Assistance Program. Illinois had implemented an emergency assistance program in which the eligibility requirements were defined significantly more narrowly than in the federal act. This Court, in an opinion by Mr. Justice Stewart, held that these limitations were within the reasonable discretion of the State.

The opinion contrasted the Emergency Assistance Program with that for Aid to Families with Dependent Children (AFDC), noting that they had parallel statutory provisions ("needy child" and "dependent child") that described eligible persons "in terms of definition of the program for which federal funding is available." *Id.* at 743 n.18. While the AFDC reference to "dependent child" was later defined specifically in the statute, the emergency assistance term "needy child" was not. Thus, this Court held, Congress intended the AFDC language (but *not* the Emergency Assistance language) to be binding in its breadth upon the State. *Id.* at 743.

The parallel to §1396 of Title XIX is remarkable. Describing eligible persons as those in need of "necessary medical services," §1396 defines the "program for which federal funding is available." Like the Emergency Program (and unlike AFDC) the key term ("necessary medical services") is *not* later defined in the statute. Thus, "necessary medical services" in Title XIX (like "needy child" in the Emergency Assistance Program) is not "statutory language . . . that can reasonably be understood as imposing uniform standards. . . on every state program."

Apart from the Preamble's reference to "necessary medical services," there is only one other reference to "neces-

sary medical services'' in the entire Title. It is 42 U.S.C. §1396a(a)(10)(C)(i)(1976), which requires that ''if medical assistance is included for any group of individuals'' other than those already receiving specified forms of public assistance, then the state plan must provide ''for making medical assistance available to all individuals who [among other specified qualifications] have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services. . . .''

This section explicitly relates to eligibility statutes. Later portions of the section, not quoted, refer to the ''amount, duration and scope'' of medical assistance only to assure that services which are made available to some specified classes are made available on the same basis to other specified classes. Eligibility as a medicaid recipient does not ensure an individual's receipt of all benefits. *Compare Rosado* v. *Wyman,* 397 U.S. 397 (1970), *with Dandridge* v. *Williams,* 397 U.S. 471, *reh. denied,* 398 U.S. 914 (1970), and *Quern* v. *Manley.*

2. The Statute Requires that "Part," But Not All, of the Services in Each Mandated Category Be Funded

The care and services required under the state plan are specified by 42 U.S.C. §1396a(13) (1976), which states that a state plan should provide:

''(A) for the inclusion of some institutional and some non-institutional care and services,'' for home health care for those entitled to nursing care,

(B) with regard to the categorically needy, ''for the inclusion of at least the care and services listed in clauses (1) through (5) of section 1905(a) [42 U.S.C. §1396d(a)],

(C) with regard to the ''medically needy,'' if they are covered, ''for the inclusion of at least'' such services, or alternatively, ''the care and services listed'' in any 7 of the clauses numbered (1) through (16) of such section and specified physicians' services in hospitals or nursing facilities ''in the event the care and services provided under the State plan include hospital or skilled nursing facility services,''

(D) for the payment of the reasonable cost ''of inpatient hospital services provided under the plan,''

(E) for the payment of the reasonable cost ''of the skilled nursing facility and intermediate care facility services provided under the plan,'' and

(F) for the payment of the reasonable cost of specified services ''provided by a rural health clinic under the plan.''

42 U.S.C. §1396d(a) (1976) defines ''medical assistance'' as follows:

''(a) The term 'medical assistance' means payment of *part* or all of the cost of the following care and services . . . for individuals . . . whose income and resources are insufficient to meet all of such cost—

(1) inpatient hospital services. . . ;

(2) outpatient hospital services;

(3) other laboratory and x-ray services;

(4) (A) skilled nursing facility services. . .

(B) early and periodic screening and diagnoses. . .

(C) family planning services. . . ;

(5) physicians' services;''

(Emphasis added.)

Twelve other categories are also listed.

It is clear either that the provision that the state plan for medical assistance need pay for only "part . . . of the cost of the following care and services," means that this Court's holding in *Beal*, 432 U.S. at 444, that "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of care" is correct, or that the language "part or all" must somehow be construed not to apply to the extent of medical services within the five delineated categories.

It might be construed to apply only to the medically needy, for whom some categories of services are optional for the States, and who are expected to pay part of the costs of their medical care to the extent their income and resources allow. But this view ignores the fact that the language in question must have been intended to apply equally with reference to the categorically needy (for whom no such cost-sharing applies) since immediately following it in the same sentence there is a qualification specified to apply to the medically needy:

> (a) The term "medical assistance" means payment of part or all of the cost of the following care and services . . . for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals [who are medically needy].

Had the Congress meant the "part or all" language to apply only to cost-sharing with the medically needy, it might have drafted the language to read:

> The term "medical assistance" means *payment of the cost of the following care and services* . . . for individuals, and *payment of part or all of the cost of the following care and services* (and with respect to physicians' or dentists' services, at the option of the State) to individuals [who are medically needy].

But Congress did not.

This observation is substantiated by the fact that §1396a (a)(13)(A)(i)(1976), requiring the state plan to provide "for the inclusion of some institutional and some non-institutional care and services" would be utterly superfluous if the States were already required to fund everything within the five delineated categories. Prior to 1967, the section read:

> (13) provide for inclusion of some institutional and some non-institutional care and services, and, effective July 1, 1967, provide (A) for inclusion of at least the care and services listed in clauses (1) through (5) of section 1905(a), and (B) for payment of the reasonable cost (as determined in accordance with standards approved by the Secretary and included in the plan) of inpatient hospital services provided under the plan.

Pub. L. 89-97, July 30, 1965, 79 Stat. 345-346 (amended 1968, Pub. L. 90-248, §224[a]).

This might plausibly give rise to the impression that the requirement of providing some institutional and some non-institutional care was merely a transitional requirement to be outmoded when the requirement to include the five delineated categories came into effect in 1967. However, when Congress amended the Act to include (B) it maintained in the Act what is now (A)(i).

The phrasing of the required categories themselves makes it unlikely that Congress meant that every "medically necessary" item within them must be funded. For example, 42 U.S.C. §1396d(a)(3)(1976) lists, as the full description of a category, "other laboratory and x-ray services." It does not say "*all* laboratory and x-ray services" or even "laboratory and x-ray services." It says, indefinitely, "other" such services.

This impression is strengthened by the way the Senate Finance Committee referred to this section in its Committee Report. After setting out the list of services "the first five of which the States are required to include in their plans, if they elect to implement Title XIX," the report adds, in explanation of an amendment adding a sixth mandatory service, "The committee believed that *some* dental services should be required as to individuals under the age of 21," S. Rep. 404, 89th Cong., 1st Sess., 80 (emphasis added), and amended what would have become §1396d(a)(4) to read:

> (4) skilled nursing home services . . . for individuals 21 years of age or older and dental services for individuals under the age of 21.

Id. at 521.

The addition of dental services as a mandated category did not survive the conference between managers for the House and the Senate, Conf. Rep. No. 682, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. and Ad. News 2228, 2246-47, but what is significant is that the Senate Finance Committee evidently equated the broad statements of each required service category with a requirement that the state plans include "some," but not necessarily all, services in that category.

3. The General Provisions of the Social Security Act and the Professional Standards Review Organization Sections Support a Construction of the Title Which Accords Discretion to the States Concerning Coverage Determinations

All parts of a law should be considered and construed together. *Boys Markets, Inc.* v. *Retail Clerk's Union Local* 770, 398 U.S. 235, 250 (1970). Implicitly, the lower court does this in stating that all "medically necessary" items

are covered—and not "all" services within the mandated categories. If "medically necessary" can be conceived to qualify the "include at least language" by putting a ceiling on what must be included, there is no basis for rejecting the holding in *Beal* that 42 U.S.C. §1396a(a)(17)(1976) similarly qualifies the general requirement of providing services in the five mandated broad categories when it empowers States to establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]." *Beal* v. *Doe,* 432 U.S. at 441.

It is true that the bulk of the detailed specifics in 42 U.S.C. §1396a(a)(17) relate to eligibility for services, rather than the extent of services. Nevertheless, the statute is explicit in including "the extent of medical assistance under the plan" as something for which the States can set "reasonable standards." It is a fundamental canon of statutory construction that, whenever possible, effect must be given to every word of a statute. *FAA Administrator* v. *Robertson,* 422 U.S. 255, 261 (1975).

Each section of a statute should be construed in connection with the rest of its sections. It is improper to confine attention to the section being construed. *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974). From this perspective, Subchapter XI of the Social Security Act strongly advances the argument that Congress has not imposed a "medical necessity" requirement upon the States through Title XIX.

Part A of Subchapter XI contains general provisions regarding Social Security programs (including Title XIX) which date back to 1965 and earlier, while Part B, 42 U.S.C. §1320c *et seq.* (1976), entitled "Professional Standards Review" (creating Professional Standards Review Organizations, "PSROs") is a recent addition to the Act. 42

U.S.C. §1320c *et seq.* (1976) (as amended 1972 Pub. L. 92-603, Title II, §249F[b], 86 Stat. 1430).

In 42 U.S.C. §1312 (1976) (Part A of Subchapter XI) Congress recognized that the question of service coverage rests primarily with the States, not with medical providers or practitioners. That section provides, *inter alia*:

> *In order to assist the States to extend the scope and content* and improve the quality, of medical care and medical services for which payments are made to or on behalf of needy and low-income individuals . . . the Secretary shall develop . . . guides or recommended standards as to the *level, content, and quality of medical care and medical services* for the use of the States in evaluating and improving their public assistance medical care programs and their programs of medical assistance, shall secure periodic reports for the States on items included in, and the quality of, medical care and services for which expenditures under such program are made.

(Emphasis added).

If Title XIX were intended to require the states to fund all "medically necessary" procedures, there would be no need for Congress or the Secretary to "assist the states to *extend* the scope and content" of their Title XIX programs. Neither the Secretary nor the States would be concerned about "standards as to the level, content and quality of medical care and services" for there would be only one uniform, unvarying standard applicable to all the States: unlimited professional discretion. Under such a standard, medical care and services would be provided in accord with a provider's professional judgment, whenever and to the extent "necessary," "in light of *all* factors affecting" a patient's health, as understood by each of the hundreds of thousands of health care providers in the United States—each doctor, dentist, pharmacist, chiropractor, physical therapist, hospital, skilled/intermediate

nursing facility, clinical laboratory, ambulance service, and any other recognized health care provider. The federal government and the States would simply pay the bill. But such a standard would render the provision of §1312 meaningless, or at best, superfluous.

It cannot be argued that the section applies only to the extension of benefits to the optionally covered "medically needy," since it refers both to the "needy" and to "low-income individuals" (the categorically needy).

The objectives of Congress with respect to the 1972 Part B amendments to Subchapter XI related to "the establishment of Professional Standards Review Organizations [PSROs] consisting of substantial numbers of practicing physicians . . . to assume responsibility for comprehensive and ongoing *review of services covered* under the medicare and medicaid programs." H.R. Rep. No. 231, 92nd Cong., 2nd Sess. 1 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News, 4989, 5391-92 (emphasis added). When Congress amended the PSRO provisions in 1977, P. L. 95-142, the legislative history of those amendments clearly discloses it was intended that PSRO legislation "would not affect other provisions of existing law relating to determinations with respect to conditions for eligibility to or payments of benefits." H.R. Rep. No. 393, 95th Cong., 1st Sess. 1, 55 *reprinted in* 1977 U.S. Code Cong. & Ad. News, 3039, 3058. PSROs have no jurisdiction whatever over issues of coverage or scope of benefits. *See* 42 C.F.R. §463.18 (1979).

The actual role of the PSRO is set forth in 42 U.S.C. §1320c and its implementing regulations. The statute itself reads:

> In order to promote the effective, efficient, and economical delivery of health care services of proper

quality for which payment may be made (in whole or in part) under this chapter and in recognition of the interests of patients, the public, practitioners, and providers in improved health care services, it is the purpose of this part to assure, through the application of suitable procedures of professional standards review, that the services for which payment may be made under this chapter will conform to appropriate professional standards for the provision of health care and that payment for such services will be made—

> (1) only when, and to the extent, medically necessary, as determined in the exercise of reasonable limits of professional discretion; and
>
> (2) in the case of services provided by a hospital or other health care facility on an inpatient basis, only when and for such period as such services cannot, consistent with professionally recognized health care standards, effectively be provided on an outpatient basis or more economically in an inpatient health care facility of a different type, as determined in the exercise of reasonable limits of professional discretion.

42 C.F.R. §463.27(c)(3) (1979) provides that "PSRO determinations shall not preclude appropriate coverage determinations under the provisions of Title XIX of the Act with regard to issues that are not subject to PSRO determination." HEW further explains that:

> [s]ections 463.26(c) and 463.27(c) make clear that the Department under Title XVIII and the States under Title XIX may establish the services that are covered on a uniform basis (scope of benefits). However, to the extent *individual* medical judgments are required to *implement these coverage rules,* it is the PSRO's responsibility and authority to make these medical judgments which must be followed by the Medicare fiscal agents and State Medicaid agencies.

43 F.R. 7406 (February 22, 1978) (emphasis added).

The PSRO's function is to undertake the case by case review of individual requests for reimbursements and to ensure that no treatment which is not medically necessary is reimbursed.

Far from substantiating the wide physician discretion considered by the lower court to be mandated by Title XIX, the establishment of PSROs manifest legislative intent to curtail the unchecked exercise of such discretion. "It was," in the words of HEW, "because the Medicare fiscal agents and State Medicaid agencies were determined not to be performing effective utilization review by Congress that the Congress instituted the PSRO concept. . . ." 43 F.R. 7406 (February 22, 1978). Indeed, the law enacting the relevant provisions was entitled "Medicare-Medicaid Antifraud and Abuse Amendments." Act of Oct. 25, 1977, Pub. L. No. 95-142 (to be codified in 42 U.S.C. §1305).

The *Bolton* definition of "medical necessity"—which states that the attending physician alone may determine whether precedures are medically indicated—is therefore utterly inconsistent with the manner in which utilization review is actually conducted under the Title. PSROs, not attending physicians, determine whether practices are "medically necessary."[18] States, not PSROs, determine the extent of coverage under Title XIX.

"Medical necessity" in the context of the review of and the setting of standards for individual medical judgments takes on a substantially different connotation than it does in the context of making scope of benefit coverage decisions with regard to such items as abortion and transsexual

---

[18] The PSRO statute was upheld against constitutional attack for interfering with the "privacy of the physician-patient relationship" in *American Assn. of Physicians and Surgeons* v. *Weinberger,* 395 F.Supp. 125 (N.D. Ill. 1975), *aff'd,* 423 U.S. 915 (1976).

surgery. In general, one needs medical care because one has a health problem: a specific illness or disease. A patient or prospective patient normally shuns any treatment, especially surgery, unless told it is required. In such cases, the primary concern is that the physician will *over-treat*—that he will because of caution, ignorance, or simple greed, employ more treatment methods than are really necessary to deal with the health problem, or employ treatment methods which are less cost-efficient than equally efficacious alternatives. Normally, medical professionals are best equipped to make such judgments, and thus mechanisms like the PSROs can provide an effective check.

For the coverage decisions concerning items like abortion, however, the context is different. In such cases, surgery is frequently sought for social or personal reasons. Here, the primary concern is that physicians can easily bring such reasons under the umbrella of "health problems" by regarding as "medically necessary" whatever may in their view contribute to "the well-being of the patient"—*e.g.*, prevent her from having too large a family, or avert "psychological harm" from being pregnant out of wedlock. Unlike a judgment whether drug X or drug Y most effectively and economically treats glaucoma, there is nothing inherently medical in such determinations. PSROs are equipped to judge the efficacy of treatments, and can easily weigh them against an immediate fiscal standard. They have no special expertise to weigh into the balance such factors as the state's interest in preserving fetal life.

Indeed, the nature of the PSRO "medical necessity" determination which the Act sets as a ceiling for coverage must be viewed as having a different nature than the sort of "medical necessity" determination the lower court considers to serve as a floor for coverage. This is indicated

by the fact that 42 U.S.C. §1320c clearly precludes payment for services which are not certifiably "medically necessary." But *Beal* emphasized that States which choose to do so can include "medically *un*necessary" abortions in the scope of their coverage. *Beal* v. *Doe,* 432 U.S. at 447 n. 11. These two legal effects can be understood as consistent only by recognizing that, as the First Circuit noted, there are "two levels of judgment as to medical necessity in the statutory scheme. The first is the macro-decision by the legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under the coverage of its plan. The second is the micro-decision of the physician, that the condition of his patient warrants the administering of a type of medical assistance which that plan makes available." *Preterm* v. *Dukakis,* 591 F.2d at 125. It is this second "micro-decision" which is subject to PSRO control. In the "micro" sphere, the fairly technical determination by the PSRO whether a given treatment is "medically necessary," in the sense of most efficient, is normally binding on both the physician provider and on the state medicaid agency. But in the "macro" sphere, the State has latitude to fund medically unnecessary items or to refrain from funding some items which might be deemed "medically necessary," provided only that it does so reasonably and consistently with the objectives of the Act.

As the House Committee on Ways and Means stated in its report on the "Medicare-Medicaid Antifraud and Anti-abuse Amendments," the pertinent parts of which are now law, "[W]here a . . . PSRO has been found competent by the Secretary to assume specific review responsibilities and is performing such reviews, a determination as to quality or necessity made in connection with such review would constitute the conclusive determination on those is-

sues for purposes of payment. . . . State medicaid agencies would continue to be responsible for other types of reviews and determinations relating to program eligibility, coverage of services, audit, claims payment, fraud and abuse detection, and related activities." H.R. Rep. No. 393, 95th Cong., 1st Sess. 1, 54 (1977).

4. The Implementing Regulation Legitimizes A State Choice to Limit Funding of Abortions

The Secretary of HEW has promulgated regulations which are consistent with the intentions of Congress and the purposes of medicaid.[19]

---

[19] Recently, through the device of a footnote in a brief (Brief for the United States, *Williams* v. *Zbaraz*, No. 79-4, p. 43 n.23), the Secretary has apparently changed HEW's longstanding interpretation to maintain that "medically necessary" care falling within "the five mandated" categories must be funded by the States, including "mediately necessary" abortions.

Prior to this change, HEW did not interpret the Title to require that all "medically necessary" procedures be funded. *See Rush* v. *Parham*, 440 F.Supp. 383, 387 (N.D. Ga. 1977), *appeal pending*, and *Virginia Hospital Ass'n* v. *Kenley*, 427 F.Supp. 781, 785-786 (E.D. Pa. 1977). HEW approves state plans which restrict abortion funding in accord with a standard short of "medical necessity." [See Appendices A through N, Affidavits filed with Brief in Behalf of William A. Lynch, M.D., et al., Amici Curiae, in *Pre-term, Inc.* v. *Dukakis*, No. 78-1324. *Parents' Aid Society, Inc.* v. *Sharp*, No. 78-1325, No. 78-1326 (consolidated cases), (1st Cir., brief filed Oct. 1978)]. The approved plans for Kansas (Appx. C), Louisiana (Appx. D), New Mexico (Appx. G), North Carolina (Appx. H) and Virginia (Appx. M) in substance limit payment for medicaid abortions services to life-threatening abortions. The variety of approved plans demonstrates the freedom accorded the States in this regard. It has long been held by this Court that great weight will be given to a *consistent* construction of a statute by the agency

(footnote continued)

HEW's regulation implementing 42 U.S.C. §1396(a)(17) is 42 C.F.R. §440.230 (1979):

> (a) The plan must specify the amount and duration of each service that it provides.

(footnote continued)

charged with its administration. *Five Per Cent Cases*, 110 U.S. 471, 484-485 (1884).

During its consideration of the Hyde Amendment, Congress relied on HEW's construction of Title XIX as allowing States to restrict abortion funding, and emphasized that it was never the intent of Congress to force the States to fund abortions. *See, e.g.*, statement of Representative Donnelly, 125 Cong. Rec. H. 9885 (daily ed. Oct. 30, 1979). Furthermore, by adopting the Hyde Amendment, the Congress acted to ratify HEW's construction of Title XIX by adopting restrictive standards for federal abortion funding. This is not a case of mere legislative inaction being interpreted as acquiescence in the interpretaion of the agency. *United States* v. *Jackson*, 280 U.S. 183 (1930). Rather, this is a case where Congress has specifically considered the construction under question, has refused to alter that construction, and has ratified it with parallel controls on the federal treasury. Under similar circumstances, where Congress has re-enacted a statute without changes, this Court has held that "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell-Aerospace*, 416 U.S. at 267, 275 (1974).

Given these circumstances of a consistent administrative construction that has been subsequently ratified by Congress, the Secretary's new order is bereft of the deference given the previous constructions. This Court has consistently given little weight to administrative constructions which have not been uniform or consistent. *Federal Maritime Bd.* v. *Isbrandten Co.*, 356 U.S. 481, 499-500 (1958).

While departmental construction of enabling language is entitled to great deference, such construction "is only one input in the interpretational equation." *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). This Court must not "abdicate its ultimate responsibility to construe the language employed by Congress," *Id.* at 193, particularly "where

(footnote continued)

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c) (1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.250 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

Three observations should be noted with respect to this regulation. *First,* this regulation conforms to the basic principle of broad state discretion in specifying the extent of medical assistance which the state will provide under its medicaid plan.[20] Discretion is the predicate of the regulation; it is then limited in certain specified ways. To infer limitations on state discretion which are not specified would be to violate the clear intent of the regulation.

(footnote continued)

there are compelling indications that [the administrative construction] is wrong." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969):

> [T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374-375, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional purpose underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291, *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968).

[20] Of course, if a given item of medical assistance (*e.g.*, "medically necessary" abortion) is made available in a particular amount, duration, and scope to any individual or individuals, it must be made equally available to all other individuals similarly situated in terms of eligibility and need. 42 U.S.C. §1396a(a)(10) [1974].

Second, by explicitly recognizing the right of the State to regulate on the basis of criteria relating to "medical necessity," the regulation plainly authorizes the States to make judgments about the *degree* of medical necessity in any given procedure (*e.g.*, that abortions to preserve life are "necessary" whereas "health" abortions are not), a fact which unquestionably forecloses claims that such determinations must be left to the discretion of physicians.

Third, the regulation asserts state agencies "may not deny or reduce the . . . scope of a required service . . . *solely* because of the diagnosis, type of illness, or condition." (Emphasis added.) But a State's choice not to fund "health" abortion is not based "*solely*" on any excluded ground. Indeed, state action based on such interests is not based on "the diagnosis, type of illness or condition" *at all.* It is based on the States' "important and legitimate interests . . . in protecting the potentiality of human life" *Roe* v. *Wade,* 410 U.S. at 162; *Beal* v. *Doe,* 432 U.S. at 445-446. Such action merely refuses to fund one alternative response—one *treatment*[21]—of some complica-

---

[21] 42 C.F.R. §440.130(a) (1979) defines "diagnostic services" as "any medical procedures or supplies recommended by a physician or other licensed practioner of the healing arts, within the scope of his practice under state law, to enable him *to identify the existence, nature, or extent of illness, injury, or other health deviation* in a recipient." (Emphasis added.) Diagnosis deals with the nature of the illness, not with the nature of the care with which a physician chooses to treat that illness.

Therefore, a State's choice to restrict funding for abortions not necessary to preserve maternal life, when it funds all alternative treatments and when those treatments fully meet the genuine needs associated with pregnancy complications, as here, does not reduce the "amount, duration and scope . . . because of the diagnosis." It is even more obvious that it does not do so "because of the . . . type of illness or condition."

tions of pregnancy on behalf of an independent valid interest in the fetus.

Thus, neither the Title nor its implementing regulations imply that the State must fund all "medically necessary" procedures. The States might properly regard funding of "medically necessary" abortion as "unreasonable" or "impracticable." They must fund "medical assistance," but only in "part." A restriction upon "medically necessary" abortion funding is not based "solely" upon diagnosis, type of illness or condition. Hence, the States may refuse to fund "medically necessary" abortion under the plain language of Title XIX.

Because a careful analysis of the statute reconfirms the validity of the *Beal* framework for analyzing the Medicaid Title, this Court should reject the lower court's ruling that the Act requires the States to fund all items within the five mandated categories which any physician calls "medically necessary," and it should reaffirm the principle that the Medicaid Title "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal* v. *Doe*, 432 U.S. at 444.

B. The Standards Established by the Hyde Amendment Are Reasonable and Consistent with the Objectives of the Act

1. The State's Interest in Fetal Life Is Consistent With the Objectives of the Act

It is striking that, despite the clear and explicit holding of this Court in *Beal* (432 U.S. at 446) that "nothing in either the language or the legislative history of Title XIX . . . suggests that it is unreasonable for a participating State to further [its] unquestionably strong and legitimate

interest in encouraging normal childbirth,"[22] not a single court which held abortion funding limitations to be inconsistent with the Act so much as mentioned this state interest in discussing the statutory validity of the limitations.[23]

An important distinction must be made. If an interest exists which is not inconsistent with the objectives of the Act, it exists regardless of the presence or importance of other countervailing interests or circumstances. Those other considerations may affect the weight that can or ought to be given to an interest, but they cannot affect the intrinsic validity of the interest itself. Nor can they, by their presence, transform an interest which is not inconsistent with the Act's objectives into one which is inconsistent. Thus, if the state's interest in fetal life is consistent with the objectives of the Act in the context of deciding whether or not to fund abortions which are openly denominated as elective, it is no less consistent with those objectives in the context of deciding whether or not to fund abortions which are desired by an indigent woman and which are then under the lower court's ruling "medically necessary."

The central error of the various lower courts which have dealt with the statutory issues has been to assess the abortion funding limitations as if their sole purpose was to pursue short-term fiscal frugality by rationing abortion-

---

[22] *See* this Brief at 57 n.14, concerning the sophistic effort to discount "normal childbirth" as an applicable state interest by the lower court in analyzing the constitutional issues.

[23] Many of the courts have discussed the state interest in fetal life in their constitutional analysis, but only *D.R.* v. *Mitchell*, 456 F.Supp. 609 (D. Utah 1978), considers it in the context of statutory analysis. *Mitchell* upheld the abortion limitations.

related care to those in greatest need of it. The cases hold that Hyde Amendment type restrictions are an "unreasonable" means of attaining this end, which they recognize as legitimate within the confines of the Act. *See, e.g., Preterm* v. *Dukakis,* 591 F.2d at 125-127, 126 n.4 (1979).

The willingness of the courts to recognize fiscal frugality as an end makes doubly inappropriate their studied neglect of the interest in fetal life.

Fiscal frugality is of no value to the State in and of itself: the value of money is purely instrumental—dependent upon the importance of that which it might purchase. Thus, when the State anywhere chooses to limit its expenditures for medicaid, it does so based on its conviction that the money saved can better be employed elsewhere—for other programs or to relieve the tax burden. In short, a State determines its budgeting allocation to medicaid by balancing its interests in the health of its indigent citizens against other independent valid state interests. Thus, one cannot concede the propriety of a benefit limitation upon fiscal grounds without accepting the proposition that coverage decisions based upon independent valid state interests, such as in the protection of fetal life, are "consistent with the objectives of the Act."[24]

---

[24] To substantiate its conclusion that the Hyde Amendment restrictions are inconsistent with the objectives of the Act the lower court (slip op. at 294) cites 42 U.S.C. §1396a(a)(19) (1974), which requires the state plan to establish safeguards to assure that in the administration of the plan individuals' eligibility is determined, and services are provided, in a manner "consistent with . . . the best interest of the recipients." It is evident on the face of this provision that it relates to the *manner* in which assistance is provided, and not to *what items* of assistance will be provided. In any case, the amorphous phrase "best interest of the recipients" is designed to provide a general objective in drawing up the plan and conceivably a

(footnote continued)

2. The Abortion Funding Limitations Are Reasonable

If the Hyde Amendment restrictions are not "inconsistent with the objectives" of the Act, the remaining question is whether they are "reasonable standards."

"Reasonable" is an amorphous term. If it is equated with the constitutional "rational basis" test, under which the question is whether the legislation is a means which in fact advances a legitimate end,[25] the restrictions are unquestionably reasonable: given that the interest in fetal life is legitimate and consistent with the Act's objectives, the restrictions in fact tend to advance that interest.

(footnote continued)

standard for HEW review, certainly not a license for courts to scrutinize every detail of each plan to arbitrarily declare which elements do, and which do not, accord with the court's own notion of what is in the "best interest" of recipients.

See S. Rep. No. 409, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Congressional and Administrative News, p. 2016-17. The Report makes it clear that Congress contemplated that the provision would apply to the *manner* in which services would be provided, and not that it would create a new substantive requirement relating to the *extent* of services provided under the state plan.

Similarly, 42 U.S.C. §1396a(a)(22)(D) (1974) and its implementing regulation, 42 C.F.R. §440.260 (1979), provide that state plans should include standards to assure that the care given under medicaid is of "high quality." Obviously, this deals with the *quality* of treatment in the items provided, and establishes no new standard to regulate the extent of medical assistance.

[25] In the words of Mr. Justice Stewart writing for the Court in *Richardson* v. *Belcher,* 404 U.S. 78, 84 (1971), "If the goals *sought* are legitimate, and the classification adopted is rationally related to the achievement of *these* goals, then the action of Congress is not . . . arbitrary. . . ." (Emphasis added.)

The court below found:

> The evidence supports the inference that an undetermined but substantial percentage of women denied medically necessary abortions under medicaid carry the fetuses to term. . . .

See also Right to Choose v. *Byrne,* 398 A.2d 587, 594 (N.J. Super. 1979) (during the period abortion funding limitations were in effect the number of births to medicaid-eligible women rose by 30%).

But if "reasonable" within the context of a statute means more than "rational" in the context of constitutional analysis—if it means that a reasonable person could conclude that the action was the result of a rational weighing of all the factors involved--the Hyde Amendment restrictions are still "reasonable."

The lower court opinion in this case demonstrates more candidly than most of the other lower court rulings that a "medically necessary" abortion is synonymous with an "elective" abortion. *See* this Brief at 15-18. If the government wishes to vindicate its interest in fetal life at all, it cannot fund all "medically necessary" abortions. How is it to avoid this?

It cannot rely on the physicians who perform abortions, in the same manner as it might, at least in the first instance, rely on them to make judgments concerning what treatment is appropriate in other areas of medical practice. Abortion is a most hotly debated and most polarizing issue. The battle lines are drawn, and abortion-performing physicians are, naturally, among the most committed of the protagonists on one side. The government could reasonably conclude that, in dealing with a group which not only does not share, but is fundamentally hostile to its interest in fetal life, it must establish limitations with particular care. It is important to emphasize that we are not talking here about physician fraud, something which arguably might

be dealt with by means other than the exclusion of an item particularly subject to fraud from coverage.[26] A physician who certified an "elective" abortion for reimbursement under the "medically necessary" standard as set forth by the lower court would not be committing fraud, but would be entirely within his rights. He would simply be acting in accordance with his sense of the woman's "well-being"—in the exceedingly broad sense encompassed by the *Bolton* standard—without taking into account the government's interest, which he may not share, in fetal life. Thus, the government would be forced to pay for the destruction of its own interest.

The government cannot rely on the PSROs. Their review and standard setting is related solely to efficacy and is not designed to take into account valid independent interests such as that in fetal life.

The only means available to the government to advance its interest in fetal life and to avoid paying for elective abortions is to set its own standards for coverage of abortions, providing qualifying language more specific than "medical necessity." In doing so, it must of course balance its interests in fetal life and in maternal health.

The lower court made the following finding of fact:

> The medical testimony was substantially in agreement that by the use of the most advanced present day medical techniques, and with close medical supervision, it was possible for women with life threatening conditions to survive pregnancy and bear children with a comparatively low ratio of maternal mortality; it

---

[26] *But see Budnicki* v. *Beal,* 450 F.Supp. 546, 557 (1978), which, although it was dealing with an "optional" rather than a "mandated" service, held it to be reasonable for a State faced with abuse with regard to a particular covered item, to terminate coverage of that item (orthopedic shoes).

> was reasonably clear that the testimony rested on the assumption that the pregnant woman was desirous of bearing the child, and was cooperative throughout the pregnancy.

Slip op. at 90-91.

In other words, treatments alternative to abortion are available (except, as the opinion elsewhere makes clear, in crisis situations). The government is willing to pay for "advanced . . . techniques" and "close medical supervision." The only other factor is whether the woman, because she does not want the child, will refuse to cooperate with the treatment. Surely, it is not unreasonable for the government to decide that those who refuse to cooperate with treatment which will meet their needs, and thereby voluntarily harm themselves, need not be provided with other treatment which may diminish the need for cooperation but which will destroy the government's interest in fetal life.

Therefore, in view of the willingness of the government to provide alternative forms of treatment, it is reasonable for the government to consider that its interest in maternal health would not be significantly undermined by restrictions on funding for abortions. In weighing that conclusion together with the certainty that its interest in fetal life would be gravely impaired by funding of vast numbers of "medically necessary " including elective abortions, it was reasonable for the government to adopt abortion funding limitations.

C. Abortion is Unique in a Manner which Permits Special Funding Limits with Regard to It

Even were this Court to overturn *Beal* and determine that the general standard for the inclusion of items within the state plan must be "medical necessity" rather than

"reasonable standards . . . consistent with the objectives" of the Act,[27] the special nature of abortion would permit States to exclude it from the services provided under their plans.

Pregnancy itself is "significantly different from the typical covered disease or disability." *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 136 (1976). Abortion is unique. "The simple answer to the argument that similar requirements are not imposed for other medical procedure is that such procedures do not involve the termination of a potential human life." *Maher* v. *Roe,* 432 U.S. 464, 480 (1977).

As Mr. Justice Stewart wrote for the Court in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis,* 100 S.Ct. 242, 247 (1979), "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." The clear attitude of the Congress of the United States, from the time of the adop-

---

[27] Even were the Court to so conclude, it is important to note that the Medicaid Title would still create no general "statutory entitlement" to the medicaid eligible for all "medically necessary" care in any "comprehensive" sense. The Medicaid Title lists 17 broad categories of care within the general definition of "medical assistance" (42 U.S.C. §1396d(a) [1976]), only five of which are "mandated" categories (42 U.S.C. §1396a(a)(13)(B) [1976]); the rest are optional with the States. They include such items as "clinic services" [§1396d(9)(a)]. "prescribed drugs" [§1396d(a)(12)] and "diagnostic . . . services" [§1396d(a)(13)]. Since abortions are frequently performed in abortion clinics, since the cost of pregnancy test (a diagnostic service) is often included in the general abortion fee, and since some forms of abortions are either done through the means of, or with the assistance of, "proscribed drugs," affirmance of the lower court's injunction requiring the funding of all "medically necessary" abortions will often mean that abortions are paid for when other "medically necessary" care within the same categories is not.

tion of the Social Security Act's Medicaid Title up to the present, has been one which disfavors abortion. There has *never* been any indication that the Congress ever intended to force the States to fund abortions. Indeed, the contrary intent has been repeatedly expressed.

Traditionally, there are two conflicting philosophies concerning the role of those engaged in statutory construction. In one view, it is said that the court should seek to carry out the actual will of the legislature. To understand that will, resort should be had to extrinsic sources, such as legislative history and contemporaneous circumstances. *See, e.g.,* Landis, *A Note on "Statutory Interpretation",* 43 Harv. L. Rev. 886 (1930). In the other view, the court should focus on what the statute as written is most likely to convey to members of the general public who are bound by it. Frankfurter, *Some Reflections on the Reading of Statutes;* 47 Col. L. Rev. 527 (1947). Of course, the conflict between these two views is largely a matter of emphasis: no partisan of the former view would advocate ignoring the plain language of the statute; no partisan of the latter view would say that one could not consult contemporaneous usage to determine the meaning of an archaic word. But in determining how much emphasis to place on either view in a given instance, it is well to take account of the policies each serve.

The principal policy supporting the view which deemphasizes reference to extrinsic sources is that those bound by a statute should not have to guess at its meaning, or find its apparent implications altered by information not present in the statute books. It applies with greatest force to criminal statutes.

In the present case, however, the bills are directed primarily to governmental personnel administrators who are specialists in the field. Here, the concerns with regard to

fair warning and reliance are less appropriate than the concern which emphasizes carrying out the will of the legislature.

Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage." *United States* v. *Wise,* 370 U.S. 405, 411 (1962).[28] Applying this canon to this case, it is clear that neither the Congress nor the States intended that Title XIX require the States to fund abortion as a condition of participation in this program of "cooperative federalism."

In 1965 when Congress enacted the Title, only two States[29] and the District of Columbia[30] permitted abortion for anything which might conceivably be held to include maternal "health" or "medical necessity." Two States permitted abortion when pregnancy presented a grave threat

---

[28] *Accord, Moor* v. *County of Alameda,* 411 U.S. 693, 709 (1973); *United States* v. *Rothberg,* 480 F.2d 534, 535 (2d Cir. 1971), *cert. denied,* 414 U.S. 856 (1973); *Ries* v. *Lynsky,* 452 F.2d 172, 175 (7th Cir. 1971); *Burns* v. *Alcala,* 420 U.S. 575, 580 (1975). *See also Roe* v. *Norton,* 522 F.2d 928, 935 (2nd Cir. 1975); *Roe* v. *Ferguson,* 515 F.2d 279, 293 (6th Cir. 1975); *Doe* v. *Rose,* 499 F.2d 1112, 1114 (10th Cir. 1974); *Beal* v. *Doe,* 432 U.S. 439, 447 (1977).

In *Beal,* the Supreme Court stated that its conclusion, based on the plain language of Title XIX, was "reinforced" by the illegality of abortion at the time of the adoption of Title XIX. *Beal* v. *Doe,* 432 U.S. at 447.

[29] Alabama and Oregon. Ala. Code tit. 46-270 (Supp. 1963); Ore. Rev. Stat. §163.060 (1964). *See* George *Current Abortion Laws: Proposals and Movements for Reform,* 17 West. Reserve L. Rev. 45, n. 44 (Dec. 1965). Massachusetts permitted "health" abortion by judicial decision in *Commonwealth* v. *Brunell,* 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961), though not as *Bolton* defined the term.

[30] D.C. Code Ann. §22-201 (1961) ("necessary for the preservation of the mother's life or health"). See *Current Abortion Laws, supra,* at 376, 376 n.32.

to life or health.[31] In 1965, 46 of the 50 States by statute proscribed abortion altogether or permitted it only to preserve maternal or fetal life; 47 of the 50 States restricted abortion more narrowly than "health" indications would permit.[32]

---

[31] Colorado and New Mexico. Colo. Rev. Stat. Ann. §40-2-23 (1964); N.M. Stat. Ann. §40A-5-1, -3 (1964). *See Current Abortion Laws, supra* n.8, at 378, 378 n.44.

[32] States providing no statutory exception: La. Rev. Stat. §14:87 (Supp. 1964); Mass. Gen. Laws Ann. ch. 272, §19 (1956); N.J. Rev. Stat. §2A:87-1 (1953); Pa. Stat. Ann. tit. 18, §4718 (1963).

States providing an exception to preserve maternal life: Alaska Stat. §11.15.060 (1962); Ariz. Rev. Stat. Ann. §13-211 (1956); Ark. Stat. Ann. §41-301 (1964); Cal. Pen. Code §274; Del. Code Ann. tit. 11 §301 (1953); Fla. Stat. Ann. §§782.10, 797.01 (1965); Ga. Code Ann. §§26-1101, -1103 (1953); Hawaii Rev. Laws §§309-3, -4 (1955); Idaho Code Ann. §18-601 (1948); Ill. Ann. Stat. ch. 38, §23-1 (Smith-Hurd 1964); Ind. Ann. Stat. §10-105 (1956); Iowa Code Ann. §701.1 (1950); Kan. Gen. Stat. Ann. §31-410 (Supp. 1963); Ky. Rev. Stat. §436.020 (1959); Me. Rev. Stat. Ann. ch. 17, §51 (1965); Md. Ann. Code art. 27, §3 (1957); Mich. Stat. Ann. §28.204 (1962); Miss. Code Ann. §2223 (1957); Mont. Rev. Codes Ann. §94-401 (1949); Neb. Rev. Stat. §§28-404, -405 (1965); N.H. Rev. Stat. Ann. §585:13 (1955); N.C. Gen. Stat. §14-44 (1953); N.D. Cent. Code §12-25-01 (1943); Ohio Rev. Stat. §2901.16; Okla. Stat. Ann. tit. 21, §861 (Supp. 1964); R.I. Gen. Laws Ann. §11-3-1 (1957); S.D. Code §13.3101 (1939); Tenn. Code Ann. §39-301 (1955); Tex. Pen. Code Ann. art. 1191 (1961); Utah Code Ann. §76.2-1 (1953); Vt. Stat. Ann. tit. 13 §101 (1959); Va. Code Ann. §18.1-62 (1960); W.Va. Code Ann. §5923 (1961); Wis. Stat. Ann. §940.04 (1958); Wyo. Stat. Ann. §6-77 (1959).

States providing preservation of maternal life and unborn child's life exception. Conn. Gen. Stat. Ann. §53-29 (1960); Minn. Stat. Ann. §617.18 (1964); Mo. Ann. Stat. §599.100 (1953); Nev. Rev. Stat. §201.120 (1963); S.C. Code Ann. §16-82 (1962); Wash. Rev. Code §9.02.010 (1956).

See Current Abortion Laws, supra, n.8 at 375-379, nn.21, 22, 23, 24, 31, 43, 44, 45.

Abortion is nowhere mentioned in the Social Security Act. No legislative history exists which would indicate Congress ever intended the Act to mandate abortion funding in any respect, much less because it might be deemed "medically necessary." The congressional failure to enact a version of the Hyde Amendment before 1976, like the congressional failure to exclude coverage of abortion in the 1972 amendments to Title XIX treated in *Beal* (432 U.S. at 446 n.10), "indicate only that Congress intended to allow such coverage, not that such coverage is mandatory. . . ." Hence, the only way that such intent can be imputed to Congress is to hold that Congress intended that the Social Security Act oblige the States to fund illegal procedures. This requires one not only to presume that Congress intended to induce the overwhelming majority of States to contravene their express public policies, but also that these States agreed to aid and abet criminal acts as a condition of their participation in the plan. Either hypothesis is plainly absurd.

Almost unanimous proscription of "health" abortion at the time Title XIX was enacted thus creates a nearly conclusive presumption that mandatory funding of "health" abortion was not and is not within the intent of the Framers of the Title.

In *Beal* v. *Doe*, 432 U.S. at 447 n.12, this Court noted that

> [a]t the time of our 1973 decision in *Roe*, some eight years after the enactment of Title XIX, at least 30 States had statutory prohibitions against nontherapeutic abortions.

Of the "30 States" the Court indicated proscribed "nontherapeutic abortion," 28 by statute proscribed abortion altogether or permitted it only to preserve maternal or un-

born life.[33] Eight years after Title XIX was passed the clear majority of States continued to proscribe abortion for "health."[34]

" 'A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' *Burns* v. *Alcala,* 420 U.S. 575, 580-581 (1975)." *Perrin* v. *U.S.,* 48 U.S.L.W. 4009, 4011 (1980).

---

[33] Twenty-four states by statute permitted abortion, if at all, only to preserve maternal life: Ariz. Rev. Stat. Ann. §13-211 (1956); Idaho Code §18-1505 (Supp. 1971); Ill. Rev. Stat., c. 38, §23-1 (1971); Ind. Code §35-1 (1971); Iowa Code 701.1 (1971); Ky. Rev. Stat. §436.020 (1962); La. Rev. Stat. §14:87 (Supp. 1972), §37:1285 (6) (1954); Mass. Gen. Laws Ann. c. 272, §19 (1970); Mich. Comp. Laws §750.14 (1948); Mont. Rev. Codes Ann. §94-401 (1969); Neb. Rev. Stat. §28-405 (1964); N.H. Rev. Stat. Ann. §585.13 (1955); N.J. Stat. Ann. §24:87-1 (1969) ("without lawful justification"); N.D. Cent. Code §12-25-02 (1960); Ohio Rev. Code Ann. §2901.16 (1953); Okla. Stat. Ann. tit. 21 §861 (1972-1973) Supp.); Pa. Stat. Ann. tit. 18, §4718 (1963); R.I. Gen. Laws Ann. §11-3-1 (1969); Tenn. Code Ann. §39-301 (1956); Utah Code Ann. §76-2-1 (1969); Vt. Stat. Ann. tit. 13 §101 (1958); Wis. Stat. §940.04 (1969); Wyo. Stat. Ann. §6-77 (1957).

Four states permitted abortion only to preserve unborn or maternal life: Conn. Gen. Stat. Rev. §53-29 (1968); Minn. Stat. §617-18 (1971); Mo. Rev. Stat. §559.100 (1969); Nev. Rev. Stat. §200.020 (1967).

See J.A. Knecht *Abortion: Contradictions and Problems,* 1972 U. of Ill. L. F. (No. 1) 179, 179 nn.25, 26 (1972).

[34] Of the remaining 19 states, 11 modeled their statutes upon the Model Penal Code in the manner of the Georgia statute, Ga. Code Ann. §26-1207 (1971), found unconstitutional in *Doe* v. *Bolton.* Knecht, *Abortion: Contradictions and Problems, supra,* n.13, at 180, 180 n.28. Thus, these States also preclude many classes of "health" abortions, if "health" is taken to mean "medically necessary" under the *Bolton* standard.

Webster's Third International Dictionary 1126 (3rd ed. 1976) gives the "ordinary meaning" of "therapeutic abortion":

> abortion induced when pregnancy constitutes a threat to the mother's life.

Of course, the Court's decision in *Roe* in 1973 did not alter the content, terms or intent of the Social Security Act.[35] In fact, if the claim made herein had been raised in 1972, it would have been dismissed as patently frivolous. Yet the intent of the enacting Congress does not change. It is historical fact.

The lower court in *Beal* suggested that there was some broad intent implicit in Title XIX that States must fund all newly available or newly legal medical practices and procedures. This view was rejected by this Court, though adopted by its dissenters:

> It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973.

Beal v. *Doe,* 432 U.S. at 453, (Brennan, J. dissenting, quoting *Doe* v. *Beal,* 523 F.2d 611, 622-623 [3rd Cir. 1975]).

---

[35] In its recent decision in *National Labor Relations Board* v. *Yeshiva University,* 48 U.S.L.W. 4175, 4177 (1980), this Court cited, as grounds for overturning an administrative agency interpretation, a contemporaneous but mistaken view of congressional constitutional authority which was held by the Congress at the time of passage of the act being construed.

There is an important distinction between abortion and a new drug not yet approved by the FDA (and hence not legally marketable at the time of the adoption of the Medicaid Title) which subsequently becomes legally marketable. Drugs as yet unapproved by the FDA are banned pending an investigation of their safety. The law does not ban particular drugs as such, but rather that class of drugs not yet shown to be safe. By contrast, abortion was banned because of the generally shared intention to protect fetal life. Abortion is not a new procedure which was not specifically within the contemplation of the legislature at the time medicaid was enacted. It is not a procedure for which treatment can be guided by general principles conceived to emanate from the Act. On the contrary, abortion was as well known then as it is now, as the laws in so many of the States prohibiting it attest.

Nor does the subsequent legalization alter the congressional intent not to force the States to fund abortion. Suppose that a State chose to decriminalize marijuana for a variety of social policy reasons, such as the widespread flouting of existing law or diversion of police resources, yet still sought to discourage its use. Suppose, then, that the State amended its state medicaid plan to provide that it would cover the use of marijuana for glaucoma—where the State was satisfied it had a demonstrated medical use—but in no other instances. If an individual physician felt that marijuana would relax his nervous patients or cheer up his depressed ones and was therefore "medically necessary" under the *Bolton* standard, it could not be seriously contended that the state exclusions would be subject to successful challenge solely on such grounds. The same contention must be rejected here.

The unconstitutionality of the laws in force against abortion at the time of the passage of the Medicaid Title does not alter this analysis. Neither *Roe* nor any subsequent

case of this Court has found the interest in fetal life, which was the basis for the anti-abortion laws,[36] to be illegitimate or unconstitutional *in itself*. Rather, this Court has simply held that this interest is not compelling enough to override the constitutional privacy right of women to abort by criminally prohibiting it or placing an "undue burden" on it. The interest is sufficiently strong and legitimate to justify distinctions in funding such as those here at stake.

"Related statutes may sometimes shed light upon a previous enactment." *Andrus* v. *Allard*, 100 S.Ct. 318, 325 (1979). Indeed, it is a basic canon of statutory construction that acts *in pari materia* should be read together. *Kokoszka* v. *Belford*, 417 U.S. 642 (1974), *reh. den.* 419 U.S. 886 (1975).

Whenever Congress has had occasion to address the issue of abortion, it has repeatedly expressed its disfavor of the procedure. The lower court itself noted, "The national policy, to the extent formulated . . . excludes use of abortion as a family planning method, 42 U.S.C. §300a-6. . . . The legislative history demonstrates conscious rejection by the Congress of any provision for therapeutic abortion as a procedure to deal with the array of the principal maternal and fetal health considerations presented during the debates." Slip op. at 293-294.

Pregnancy disability legislation specifically exempted abortions from coverage for medical benefit and disability pay unless an abortion was necessary to save the life of the mother. Civil Rights Act of 1964—Pregnancy Discrimination, Pub. L. No. 95-555, §1(k) (1978) (to be codified in 42 U.S.C. §2000e). Legislation perpetuating the Legal Services Corporation included provisions which restricted the

---

[36] Gorby, *The Right to An Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 1979 S. Ill. U. L. J. 1, 15-19, esp. 15 n.82, 16 n.83.

actions of corporation attorneys in abortion cases. Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, §10(b)(1) (to be codified in 42 U.S.C. §2996f). Congress has also repeatedly restricted funds available for abortions. Groups affected by these restrictions include military personnel and their dependents (Department of Defense Appropriation Act, 1979, Pub. L. No. 95-457, §863), medicaid recipients (Department of Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, §210),[37] and residents of the District of Columbia (District of Columbia Appropriations Act, 1979, Pub. L. No. 96-93). The use of Peace Corps funds for abortions has also been prohibited. Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481. Such repeated action by Congress clearly demonstrate consistent legislative intent and public policy.

In light of longstanding congressional policy, it would do violence to the unequivocal legislative purpose if this Court were to hold that the Medicaid Title requires States to fund abortions.

---

[37] In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), this Court dealt with the relation between the Endangered Species Act and subsequent appropriations. The Court noted, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act." *Id.* at 173. By contrast, the appropriations which were seen as inconsistent with §7 were clear expressions not of the full Congress, but only of the Appropriations Committees. *Id.* at 193. Here, however, the Hyde Amendments are very plain, and assuredly well-known by the entire Congress. The underlying statute, by contrast, is silent with respect to abortion. Here, the less definite provision was later clarified by Congress. Such a subsequent pronouncement by an entire legislature can properly be accorded "great" or "significant" weight by a court charged with interpreting the earlier statute. *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381 (1969); *United States* v. *Stafoff*, 260 U.S. 477, 480 (1923).

Therefore, the district court's holding that Title XIX standing alone requires the States to fund all "medically necessary" abortions is erroneous. It must be reversed.

CONCLUSION

The judgment and opinion of the district court, insofar as they declared the Hyde Amendment unconstitutional, declared that the Medicaid Title would require funding of abortions, and ordered the Secretary of Health, Education, and Welfare to authorize the expenditure of federal matching funds for "medically necessary abortions," must be reversed.

Respectfully submitted,

JAMES L. BUCKLEY
JESSE A. HELMS
HENRY J. HYDE
ISABELLA M. PERNICONE
Intervening Defendants-Appellants
By:
DENNIS J. HORAN
VICTOR G. ROSENBLUM
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
American United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, IL 60601
312/263-5386

GERALD E. BODELL
150 E. 35th St.
New York, NY

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

March 18, 1980.

FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

CORA MCRAE, ET AL.,
Appellees.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLEES

JANET BENSHOOF
JUDITH LEVIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036

RHONDA COPELON
NANCY STEARNS
Center for Constitutional Rights
853 Broadway
New York, New York 10003

HARRIET PILPEL
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022

SYLVIA LAW
New York University School of Law
40 Washington Square South
New York, New York 10012

EVE PAUL
Planned Parenthood Federation
of America
810 Seventh Avenue
New York, New York 10019

ELLEN K. SAWYER
Corporation Counsel of the City
of New York
Municipal Building
New York, New York 10007

Attorneys for the Appellees

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	i
INTRODUCTION.	1
ARGUMENT.	5
I. THE INTERVENING-DEFENDANTS DISTORT THE NATURE OF PLAINTIFFS' LEGAL CLAIMS AND THE DISTRICT COURT'S FINDINGS OF FACT	5
A. The Legal Issues Are Distorted by the Intervening-Defendants.	5
B. The Factual Findings Are Distorted by Intervening-Defendants.	8
II. APPROPRIATIONS RIDERS ARE NOT IMMUNE FROM JUDICIAL SCRUTINY. CLASSIFICATIONS CREATED IN GOVERNMENT BENEFIT PROGRAMS MUST MEET MINIMAL CONSTITUTIONAL STANDARDS. THE UNCONSTITUTIONALITY OF A PENALIZING CONDITION FOR EXCLUSION DOES NOT MANDATE JUDICIAL DESTRUCTION OF THE ENTIRE STATUTORY PROGRAM. . . .	20
III. NONE OF THE ISSUES RAISED BY DEFENDANTS RESPECTING THE FIRST AMENDMENT CLAIMS HAS MERIT. . .	33
A. Plaintiffs-Appellees have Standing to Challenge the Hyde Amendment Under the Free Exercise Clause. . . .	33

Page

B. Defendants' Arguments Ignore the Governmental Obligation of Neutrality Imposed Where Religious Liberty Is At Issue. . . . 40

C. The Hyde Amendments Do Not Merely Parallel the Religious Belief That the Fetus Is Human Life; They Embody and Advance It 51

IV. THE INTERVENING-DEFENDANTS' INTERPRETATION OF TITLE XIX IS INCONSISTENT WITH THE PLAIN WORDS OF THE STATUTE, ITS CLEAR LEGISLATIVE HISTORY, THE CONSISTENT REGULATORY INTERPRETATION OF SUCCESSIVE SECRETARIES OF HEW, AND THE POSITION OF THE SECRETARY IN THE PRESENT CASE. 65

TABLE OF AUTHORITIES

Cases:

Baker v. Carr, 369 U.S. 186 (1962) . . 24,36

Beal v. Doe, 432 U.S. 438 (1977) . . . 67,71

Board of Education v. Allen, 392 U.S. 236 (1968) 35

Califano v. Goldfarb, 430 U.S. 199 (1977) 29

Califano v. Jablon, 430 U.S. 924 (1977), aff'g. 399 F. Supp. 118 (D. Md. 1975) 29

Califano v. Westcott, 99 S. Ct. 2655 (1979) 27,28,30,31,32

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) . . 43,53

Craig v. Boren, 429 U.S. 190 (1976) . . 36

Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977) 72

Doe v. Bolton, 410 U.S. 179 (1973) . . . 49

D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978) rev'd No. 78-1675 (10th Cir., March 10, 1980) 73

Engel v. Vitale, 370 U.S. 421 (1962) 39,49,62

Epperson v. Arkansas, 393 U.S. 97 (1968) 55,56

Everson v. Board of Education, 330 U.S. 1 (1947) 43,44,46,48

Flast v. Cohen, 392 U.S. 83 (1962) . . 36, 38,39

Frontiero v. Richardson, 411 U.S. 677 (1973). 30

Gillette v. United States, 401 U.S. 437 (1971) 45

Graham v. Richardson, 403 U.S. 365 (1971) 29

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1972) 25

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 34-38

Jiminez v. Weinberger, 417 U.S. 628 (1974) 29

Lemon v. Kurtzman, 403 U.S. 602 (1971) 58

Lewis v. Martin, 397 U.S. 552 (1970). . 72

McDaniel v. Paty, 435 U.S. 618 (1978). .64

McGowan v. Maryland, 366 U.S. 420 (1961) 51-54, 57,58

Maher v. Roe, 432 U.S. 464 (1977). .8,40,58

Malnak v. Yogi, 592 F. 2d 197, 209 (3d Cir. 1979). 53

Marbury v. Madison, 1 Cranch 137 (1803) 22, 24

Meek v. Pittenger, 421 U.S. 349 (1975) 58-9

Memorial Hospital v. Maricopa County 415 U.S. 250 (1974). 30

Muskrat v. United States, 219 U.S. 346 (1911). 25

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 37

New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (per curiam) 30

Norwood v. Harrison, 413 U.S. 455 (1973) 41,43

Powell v. McCormack, 395 U.S. 486 (1969) 24

Roe v. Wade, 410 U.S. 113 (1973). . passim

Rush v. Parham, 440 F. Supp. 383 (N.D. Ga. 1977) 69

Rush v. Poythress, No. 77-2542 (Fifth Circuit, April 8, 1980) . . 66

School District of Abington v. Schempp, 374 U.S. 203 (1963) . .passim

Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 56,57

Shapiro v. Thompson, 394 U.S. 618 (1969) 29

Sherbert v. Verner, 374 U.S. 398 (1963) 4,40-42,44, 48

Sierra Club v. Morton, 405 U.S. 727 (1972) 35

Singleton v. Wulff, 428 U.S. 106 (1976) 38,39

Smith v. Organization of Foster Families, 431 U.S. 816 (1977). . . 16

Speiser v. Randall, 357 U.S. 513 (1958).49

Torcaso v. Watkins, 367 U.S. 488 (1961) 46,49

United States v. Lovett, 328 U.S. 303 (1946) 21

United States v. Nixon, 418 U.S. 683 (1974) 72

United States v. Seeger, 380 U.S. 163 (1965) 34,37,45, 46,48

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). .35,38

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 30

Valley Family Planning v. The State of North Dakota, 475 F. Supp. 100 (D.N.D. 1979) 18

Walz v. Tax Commission, 397 U.S. 664 (1970) 46

Warth v. Seldin, 42 U.S. 490 (1975) .35,37

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 29

Welsh v. United States, 398 U.S. 333 (1970). 27

White v. Beal, 555 F.2d 1146 (3d Cir. 1977), aff'g 413 F. Supp. 1141 (E.D. Pa. 1976). 72

Williams v. United States 289 U.S. 553 (1933) 26

Williams v. Zbaraz, ___U.S.___, 99 S. Ct. 2095 (1979). 21

Wisconsin v. Yoder, 406 U.S. 205 (1972). . 34

Wolman v. Walter, 433 U.S. 229 (1977). . . 43

Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979), appeal granted, juris. postponed, Williams v. Zbaraz, 79-4, 79-5, 79-491 (1979).passim

Statutes, Rules and Regulations:

Fed. R. Civ. P., Rule 12(h). 36

42 U.S.C. §300, Declaration of Purpose . . 17

42 U.S.C. §300a-5. 42

42 U.S.C §300a-7. 42

The Adoclescent Health Services and Pregnancy Prevention and Care Act of 1978, 92 Stat. 3595, codified at 42 U.S.C §§300a-21 et. seq. 7

Social Security Act, 42 U.S.C §§301 et. seq.:

42 U.S.C §602(a)(15)(B) 17

42 U.S.C.§603(f) 17
42 U.S.C.§708(a)(3) 17
42 U.S.C.§1320c-4-5-9 74
42 U.S.C.§1396 66
42 U.S.C.§1396a(a)(13)(B) . . . 66,67
42 U.S.C.§§1396a(a)(17). 66-68
42 U.S.C.§1396(a)(5) . . 17
42 U.S.C.§1396d(a)(1)(5) 66-7
42 U.S.C.§1396d(a)(4)(B) 7
42 U.S.C.§1396d(a)(4)(C) 17

Holman Rule, House Rule XXI, Rules and Manual of the House of Representatives for the Ninety-Sixth Congress (House Doc. No. 95-403) 20

42 C.F.R.§51a.130(f)(3). 18

42 C.F.R.§59.5(d) 18

42 C.F.R.§59.5(e) 18

42 C.F.R.§440.230(1979) 71

42 C.F.R.§§440.210and 440.220 71

42 C.F.R.§440.230(1979) 76

45 C.F.R.§249.10(a)(5)(1970-1979). . . 70

Other Authorities

116 Cong. Rec. 24092, 24097, 37375, 37384-86(1970) 42

ALI, Model Penal Code§207.11, Comment(Tent. Draft No. 9, 1959) . 60

Clark, M.(ed.), An Aquinas Reader (1972)52

Clark, T., "Religion, Morality and Abortion: A Constitutional Appraisal," 2 Loyola (L.A.) L. Rev. 1 (1969). 60

Deschler's Precedents of the U.S. House of Representatives, Ch. 26,§10.7 20

Edelstein, L., The Hippocratic Oath (1973) 59

Ely, "United States v. Lovett: Litigating the Separation of Powers," 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1, 8-10 (1975). .26

Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on Judiciary, 93 Cong., 2d Sess., on S.J. Res. 119 and S.J. Res. 130, Vol. I (Abortion - Part I)(1974). .60

HEW Handbook of Public Assistance Administration, Supplement D, §D-5140, issued June 14, 1966 . . .70

Lader, L., Abortion II (1973) 61

Pfeffer, L. Church, State and Freedom (1953) 46

Program Guidelines for Project Grants for Family Planning Services, U.S. Dept. of Health, Education and Welfare (January 1976) 18

Tribe, L., American Constitutional Law (1978) 61

Tribe, L.,"1973 The Supreme Court Forward," 87 Harv. L. Rev. 1 (1973) . . . 60,63

INTRODUCTION

The principal defendant in this action, the Secretary of HEW, disputes neither the evidence nor the district court's findings of fact on the devastating impact of the Hyde restriction on the lives and health of poor women and the total incomprehensibility of the Hyde standards in medical practice. The Secretary simply ignores them.[1/] Further, the Secretary confirms that, but for the Hyde Amendment, the Social Security Act requires states to reimburse all medically necessary abortions for eligible recipients. U.S. Brief in Zbaraz at 43, n.23. The Secretary agrees with plaintiffs that governmental interests in the potential life of the fetus compete with the Medicaid statute's central purpose of promoting the health of eligible individuals, and that the Hyde Amendment mandates a preference for fetal life at the cost of women's health. U. S. Brief in Zbaraz at 22, 60, 62. The Secretary argues only that, under the most deferential standard,

---

1/ The Solicitor explicitly relies here on his Brief for the United States in Williams v. Zbaraz, No. 79-4; Miller v. Zbaraz, No. 79-5; and United States v. Zbaraz, No. 79-491. Brief of the Secretary at 22. References to that Brief will be indicated as "U.S. Brief in Zbaraz."

the government could eliminate abortion funding and demand that women sacrifice their health and even their lives to preserve potential life and encourage childbirth. Brief of the Secretary at 22; U.S. Brief in Zbaraz at 21. Indeed, the Secretary flatly states that Congress could constitutionally eliminate abortion funding altogether. Id. at 62.

Intervening-defendants-appellees (hereinafter "intervening-defendants") distort, but do not dispute, the evidence presented at trial of the health implications of some pregnancies and the arbitrary manner in which the Hyde standard has actually been applied. (See section IB, infra.) The intervening-defendants argue that the judgment of the district court is contrary to Article I, section 9, clause 7 of the Constitution because it "appropriates" money. The government does not join in this claim.

Intervening-defendants take issue with the Secretary, as well as with the plaintiffs, on three other points. First, in flat contradiction to the undisputed facts, they argue that the Hyde Amendments promote state interests in maternal health, as well as fetal life. (See IB, infra; Int-Def. Brief at 59, 94.) Second, they argue that the Secretary and over a

dozen federal courts are wrong in concluding that the Social Security Act requires funding for a broad range of medically necessary services, including medically necessary abortions. Int-Def. Brief at 67-68. Finally, intervenors ignore the plain fact that plaintiffs' claims have consistently been no more than that, given a statutory Medicaid program requiring funding for medically necessary services, it is impermissible to exclude medically necessary abortions. Rather, intervenors would transform plaintiffs' claims into an assertion that the Constitution imposes a duty upon the state to insure access to, and pay for, abortions.

The Secretary and intervening-defendants only partially agree in their approach to appellees' free exercise claims. Both ignore the fact that these claims are also based in a statutory context which automatically accommodates religious and conscientious choice among necessary medical services. Both ignore that the claim is not that the government has an affirmative constitutional obligation to fund the free exercise of religion, but rather seeks to prevent the government from exacting surrender of religious scruples as a condition of access to Medicaid and from

violating its obligation of neutrality with respect to competing religious beliefs. Sherbert v. Verner, 374 U.S. 398, 409, 412 (1963)(Douglas, J., concurring). Beyond this, the government challenges plaintiffs' standing to raise the free exercise challenge. The intervenors take issue with treating conscientious religious decisions with the same respect as religiously mandated conduct and suggest that relief under the Free Exercise Clause should be limited to requiring women seeking abortion based on religious mandates to prove their entitlement to exemption.

The intervening-defendants did not address appellees' Establishment Clause claims. The government addresses only the purpose aspect of the claim, misstates the governing standard, and tries unsuccessfully to explain the district court's distinction between "traditionalist" and "religious" morality by citing sources and courts which, as recognized in Roe v. Wade, 410 U.S. 113 (1973), only confirm the religious nature of the "traditionalist" opposition to abortion, based--as are the Hyde Amendments--on beliefs about the human status of the fetus.

ARGUMENT

I. THE INTERVENING-DEFENDANTS DISTORT THE NATURE OF PLAINTIFFS' LEGAL CLAIMS AND THE DISTRICT COURT'S FINDINGS OF FACT.

A. The Legal Issues Are Distorted By the Intervening-Defendants.

The intervening-defendants attempt to characterize the plaintiffs' claim to the funding of all medically necessary abortions and the decision of the district court as a mandate to fund medically necessary abortions. Int-Def. Brief at 12-13, 33-38. However, plaintiffs' claims, under both the First and the Fifth Amendments, are addressed to the deliberate exclusion of one medically necessary service from a statutory program which creates entitlement from funds already appropriated to payment for a broad range of medically necessary services to eligible individuals and prohibits exclusion on the basis of diagnosis or condition. The question here is framed in the context of a program which reimburses the cost of all medically necessary services, including childbirth, and--but for the Hyde Amendment--would include therapeutic abortions.

Plaintiffs challenge only affirmative congressional action denying funds for

services that are otherwise required by Title XIX. Intervenors argue that the district court's holding would require that if the government builds a recreational park, it must provide for swimming pools and baseball fields "to 'ensure access' for all recreational uses." Int-Def. Brief at 49. That would indeed be absurd, but it has nothing to do with the issues actually presented in this case, which would be more clearly paralleled if the government excluded from the park all persons who had any health impediment.

The Secretary agrees that plaintiffs' Fifth Amendment claims raise an issue of the constitutionality of the exclusion of one service from an otherwise comprehensive program of entitlement. Brief of the Secretary at 21-27.[2/] Poor women seeking abortions

---

2/ The Secretary does, however, apparently misunderstand another issue, i.e. the special claims of teen-agers. Brief of the Secretary at 24-28. Plaintiffs' claim did not, as the Secretary suggests, depend on the disparate impact on teen-agers as constitutionally significant. Rather, plaintiffs' claim that the situation of teen-agers requires special scrutiny was based on two other factors. First, the

(footnote continued on next page)

face many obstacles. Many are not eligible for Medicaid, in any event. Many live in areas where there is no doctor or clinic or hospital willing to perform abortions. Plaintiffs assert no claim under the Constitution of governmental obligation to facilitate or "ensure access" to abortion. However, when the government acts to withdraw Medicaid entitlement for this one medically necessary

---

(footnote continued from preceding page)

uncontested evidence is that all of the medical risks and problems of pregnancy are devastatingly greater in relation to teens, particularly very young girls, than in relation to adults. Brief of Appellees at 45-49. Second, the Social Security Act mandates a higher level of benefits and protection for teen-agers then for adults. With respect to adults, the Act's mandate is simply to make funding available for required medically necessary services. The individual must locate a physician willing to serve her. By contrast, with respect to teen-agers, the Act mandates that the state develop a program of "early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment and other measures to correct or ameliorate defects... discovered thereby." Pub. L. No. 90-248, §302(a), 81 Stat. 905 (1968) codified at 42 U.S.C. §1396d(a)-(4)(B). The Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, 92 Stat. 3595, codified at 42 U.S.C. §§300a-21 et. seq., also recognizes the grave problems that pregnancy creates for teen-agers and mandates special programs to address these problems.

service, such affirmative governmental action must meet minimal constitutional standards. Maher v. Roe, 432 U.S. 464, 469, 470 (1977).

Even if Congress is free to repeal the Medicaid statute en toto; even if states are free to withdraw from the program; and even if both are free to further legitimate secular interests by placing reasonable limitations on Medicaid eligibility and the scope of services, it does not follow that funding can be made available for all medically necessary services but not for the single one of abortion. Intervenors cannot transform the claim that this is unconstitutional by asserting wrongly that plaintiffs are claiming a constitutionally based obligation to make funds available for medically necessary abortions even if such funds were not available for other procedures.

B. The Factual Findings Are Distorted By Intervening-Defendants.

Intervening-defendants either distort or entirely disregard the district court's findings of fact. They erroneously claim that the trial court denies any distinction

between elective and medically necessary abortions, thus requiring the government to fund all abortions. Int-Def. Brief at 15-18. This argument implies that abortions performed in any circumstances short of an immediate threat to the woman's life are non-therapeutic.3/

Neither the district court found, nor the plaintiffs assert, that all abortions are medically necessary. The medical witnesses, on whom the court relied, clearly distinguished elective and medically necessary abortions, defining the former as those requested for social or emotional convenience, or for family planning purposes. (Bingham, T.491; Rothschild, T.686-7.) Dr. Rothschild testified that "a significant percentage" of abortions are not medically indicated. (T.687.) Dr. Eliot stated that 33% to 50% of all abortions are not medically necessary. (T.421.)

3/ The intervening-defendants offered this definition of "therapeutic abortion" in the lower court, arguing that: "Therapeutic abortions are those... where pregnancy constitutes a threat to the mother's life." Intervenors' Memorandum on Title XIX of the Social Security Act, Equal Protection, Due Process, and Vagueness Claims, at 19-21. A copy is being lodged with the Court. R.161/162.

Dr. Bingham, in distinguishing abortions of social convenience, qualified this difference for different population groups. While wealthier women more often had abortions for reasons of convenience, among poor women he didn't "know of very many abortions of convenience. These women are already in a very difficult socio-economic, but also a medical situation [so] that their risks are greater."[4/] (T.495.) Intervening-

---

4/ Intervening-defendants distort the testimony of Drs. Hodgson and Hofmann by taking it out of the context of their practices. Dr. Hodgson is the only provider of late second-trimester abortions in St. Paul, Minnesota. (T.34-35.) Forty-two percent of her second-trimester abortion patients are dependent upon Medicaid. (T.31-32.) These patients are a high-risk population; they come from as far away as Canada, the Dakotas, and other neighboring states.

Dr. Hofmann testified that all unwanted pregnancies among teen-agers warrant medically indicated abortions. She also deals with a particular, high-risk, population group. Dr. Hofmann elaborated at great length about the devastating physical and mental impact of pregnancy on the adolescent population. The district court relies heavily on Dr. Hofmann's testimony of the physical impact, particularly on young adolescents; intervening-defendants, by singling out only the social impact of adolescent pregnancy, distort Dr. Hofmann's interpretation of medical necessity. Int-Def. Brief at 17.

defendants' witness, Dr. Pisani, agreed that poor women are at greater medical risk in pregnancy. He estimated that they are two to three times more likely than non-poor women to have life-endangering complications. (T.2221.)

Intervening-defendants suggest that the district court's consideration of poverty as a medically relevant factor means that all abortions for indigent women are medically necessary. Rather, the court recognized that since poor women are medically a high-risk group, they would have a higher incidence of medically necessary abortions than higher-income women who lead a "well-nourished life and [have] regular health care." Slip op. at 309. Poverty is thus a factor to be considered in determining impact on the woman's health, but it does not make every abortion medically necessary.

Intervening-defendants similarly distort the lower court's findings on the impact of unwantedness, asserting that it alone would warrant a conclusion of medical necessity. The court found only that it is a "factor deranging the management of pregnancy and aggravating the risks from otherwise controllable complications." Slip op. at 309.

(Emphasis added.) Unwantedness alone does not medically indicate termination of a pregnancy, but in combination with other complications it can make an abortion medically necessary. In some cases, unwantedness can produce severe physical complications.[5/] It can also make it impossible for a woman to follow a proscribed regimen of care that is required because of pre-existing complications or those which develop as a result of the pregnancy. (Romney, A.216.) Or she simply may be unable to obtain the bedrest required to avoid damage to her health. To a woman already suffering from mental illness, an unwanted pregnancy can cause a severe regression and impede her recovery. (See Appellees'Brief at 33; Eliot, T.435; Belsky, A.185.) A patient's will and ability to follow different forms of medical treatment

---

5/ Dr. Sloan testified about the physical ramifications of an unwanted pregnancy. Hyperemesis, or excess vomiting, for example, believed to be a psychosomatic reaction to unwanted pregnancy, can become crippling. (A.168-169.) One of Dr. Belsky's patients had lost 18 pounds as a result of this affliction. (Pl. Ex. 159, T.3601, A.280.) Not every unwanted pregnancy will result in hyperemesis, yet stress can be severe enough to bring about this result.

are constant factors in the determination of what constitutes medically necessary treatment.

In discussing familial concerns, the district court found that the "elements of threatened physical or mental health damage are also present in different degrees, which show the pitiably distressed familial circumstances of the pregnant women, and the manifest bearing of familial circumstances on the decision to continue or terminate a pregnancy." Slip op. at 125.

A medically necessary standard does not mean that all abortions sought by poor women will be funded. The number of funded abortions has decreased dramatically in states which have ceased funding elective abortions and instead fund only medically necessary ones. Illinois, for example, funded less than half the abortions reimbursed under an elective standard when it restricted funding to medical necessity. Brief of Plaintiffs-Appellees, Zbaraz, at 7.

Intervening-defendants also claim that the Hyde Amendment, by providing funds for abortion to preserve a pregnant woman's life and for medical procedures alternative to abortion in health-threatening cases,

advances both the interests of protecting maternal health and fetal life, and therefore does not deny women a "basic necessity of life." Intervening-Defendants' Brief at 39. This is absurd and completely ignores the findings of fact. The record amply demonstrates, and the district court found, where Medicaid funding is limited by the life-endangering standard, there are very serious adverse effects on the health, and indeed the very life, of some poor women. The inability of doctors to interpret the life-endangering standard has meant that abortions are denied even for women whose lives are in fact endangered. Slip op. at 91-101.

That the state will pay for abortion where a pregnant woman's life is so clearly in jeopardy that a doctor may be willing to certify an abortion, will not necessarily save her life. The lethal infection that results in pregnancy with an IUD in place is almost impossible to stop once it has begun. (Hodgson, A.197.) And the maternal mortality studies introduced by the intervening-defendants demonstrate that abortion is frequently too late when it is undertaken after the onset of the life-threatening crisis. Brief of Appellees at 57, n.84.

Even if the best medical care can often carry a willing patient through a life-threatening pregnancy, the best medical care cannot insure her against often life-long impairment to her health or safeguard her future childbearing capacity. The best medical care cannot eliminate the increased mortality and morbidity suffered by young teen-agers. (Pl. Exh. 244, at 4, slip op. at 142.)

In the real world, there is no medical solution for the woman whose physical condition demands drugs that may damage the fetus. Medicaid obviously cannot finance a treatment that doesn't exist. The fact that Medicaid will pay vast sums for the medical treatment of the deformed child is not, as intervenors suggest, an "alternative treatment." Similarly, in the real world, there is no magic potion that Medicaid might finance that would dissipate the stress that produces hyperemesis, supra n.3. Where the woman's medical condition is such that pregnancy can be successfully continued only if she spends months in bed, Medicaid will not finance extensive hospitalization solely for the purpose of providing bed

rest.[6] That Medicaid will pay for the complications of illegal abortions, or will finance crisis intervention does not reconcile the competing interests in maternal health and fetal life.

There is no alternative treatment for pregnancy resulting from rape or incest. Forcing plaintiff Ann Moe, a 15-year-old schizophrenic, to continue her pregnancy would result in severe and long-lasting mental health damage, as well as possible physical damage because of her age. (A.113-15.) How, in such a case, could the interest in her health and the interest in fetal life both be served by the Hyde Amendment? (See also Dr. Eliot's description of the impact of pregnancy on a rape victim, A.161-2.)

Intervening-defendants correctly note that there is a long-standing federal commitment to the protection of maternal and

---

6/ A disabling pregnancy requiring long hospitalization makes it impossible for a woman to care for her family or, in fact, even to keep her family together. Her children may be separated, placed in foster care, and, as happens repeatedly, never be reunited as a family unit. See Smith v. Organization of Foster Families, 431 U.S. 816, 824, n.10 (1977).

infant health. Int-Def. Brief at 64, n.17. They fail to note that since 1967, the Congress has pursued a vigorous policy of encouraging voluntary family planning and assisting people who wish to avoid the birth of unwanted children.[7] The Congres-

---

7/ The 1967 Amendments to the Social Security Act required that states participating in AFDC offer family planning services to all appropriate and eligible individuals. Social Security Act, §402(a)-(15)(B), 42 U.S.C. §602(a)(15)(B). The 1967 amendments also expanded the Maternal and Child Health programs, created by Title V of the Social Security Act, to include family planning services. Act, §503(a)(3), 42 U.S.C. §708(a)(3). In 1970 Congress determined that greater federal effort was necessary to achieve the goals of voluntary family planning. The Family Planning Services and Population Research Act of 1970, added as Title X of the Public Health Service Act, was adopted for the specific purpose of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. 91-572, Sec. 2(1), Declaration of Purpose, 42 U.S.C. §300, historical note. In 1972 Congress required that family planning services be a mandatory element in all state Medicaid programs. Act §1905(a)(4)(c), 42 U.S.C. 139-bd(a)(4)(C). Congress also increased the level of federal matching funds for family planning services now required under both Medicaid and AFDC so that the federal share was 90%. Social Security Act, §1903(a)(5), 403(3), 42 U.S.C. §§1396(a)(5)(Medicaid), 603(e)(AFDC). The 1974 Amendments provided that states which did not comply with the federal

(footnote continued on next page)

sional history of programs encouraging voluntary family planning negates any assumption of federal purpose to encourage the birth of unwanted children. Slip op. at 293. Intervening-defendants argue that the denial of medically necessary abortions somehow protects maternal and child health.[8/] The assertion is absurd.

(footnote continued from preceding page)

family planning requirements would be penalized by a one percent reduction in general AFDC federal matching funds, thus providing a more effective remedy for assuring that states provide the voluntary family planning services Congress deems essential. Social Security Act, §403(f), 42 U.S.C. §603(f).

8/ Intervening-defendants assert that Title V does not contemplate "abortion as a solution to maternal health problems." Int-Def. Brief at 64, n. 17. While abortion is not considered to be a "method of family planning" under the federal statutes, supra n. 7, local agencies receiving funds under Title V and Title X are specifically required to make referrals for all appropriate medical treatment, including medically necessary abortions. 42 C.F.R. §51a.130(f)(3), 42 C.F.R. §59.5(d), 42 C.F.R. §69.6(3), Program Guidelines for Project Grants for Family Planning Services, U.S. Dept. of Health, Education and Welfare (January, 1976), at 1, 15, 17, 22, Valley Family Planning v. The State of North Dakota, 475 F.Supp. 100, 104-05 (D.N.D. 1979).

The district court's findings of fact are a proper exercise of its judicial function. The court was not assessing the wisdom of legislative policy, but rather exploring the facts essential to a reasoned application of the law. Plaintiffs' First and Fifth Amendment claims assert that the actual purpose animating the Hyde restriction is constitutionally impermissible. Plaintiffs assert that the magnitude of the threat to their life and health is constitutionally relevant, and that the Hyde restriction in fact serves no legitimate purpose. Plaintiffs claim that the Hyde standard is impermissibly vague and uncertain, on its face and as applied. The district court was obliged to evaluate the factual basis of these claims so the court could conclude that the asserted government interest in encouraging normal childbirth is not, and cannot be, furthered by the Hyde Amendment. The district court's findings will enable this Court to review the legal conclusion that the Hyde Amendment is unconstitutional.

II. APPROPRIATIONS RIDERS ARE NOT IMMUNE FROM JUDICIAL SCRUTINY. CLASSIFICATIONS CREATED IN GOVERNMENT BENEFIT PROGRAMS MUST MEET MINIMAL CONSTITUTIONAL STANDARDS. THE UNCONSTITUTIONALITY OF A PENALIZING CONDITION FOR EXCLUSION DOES NOT MANDATE JUDICIAL DESTRUCTION OF THE ENTIRE STATUTORY PROGRAM.

Intervening-defendants and certain amici contend that this Court does not have the power to review congressional decisions on appropriations matters.[9/] (See Brief of Intervening-Defendants at 20-33, and the Brief Amici Curiae of Certain Congressman at 14-24.)

9/ Central to intervening-defendants' contention that Congress has refused to appropriate funds for medically necessary abortion is its characterization of the Hyde Amendment as "Holman Rule"--House Rule XXI, Rules and Manual of the House of Representatives for the Ninety-Sixth Congress (House Doc. No. 95-403). However, the Holman Rule is limited to those provisions which "shall retrench expenditures." Id. To be a Holman Rule, the limiting amendment must necessarily, and not just probably, reduce expenditures under the Bill. Id. at §844. It must be "apparent that the prohibition will reduce amounts covered by the bill...and that the funds not otherwise used as a result of the amendment would not otherwise be allocated to other classes of recipients." Deschler's Precedents of the U.S. House of Representatives, Chapter 24, §10.7. Because the cost of pre-natal care and childbirth is over (footnote continued on next page)

In United States v. Lovett, 328 U.S. 303 (1946), this Court held unconstitutional, as a Bill of Attainder, the refusal of Congress to appropriate funds to pay the salaries of certain government employees alleged to be "subversive." Id. at 305. As here, Article I, section 9, clause 7 of the Constitution was invoked to support the claim that the challenged statute was not "justiciable" because it "involved simply an exercise of congressional powers over appropriations... [and was] not subject to judicial review." Id. at 306-07. At oral argument in Lovett, counsel for Congress conceded that the logic of this argument compelled the conclusion that a congressional provision that "no

---

(footnote continued from preceding page)

seven times the cost of abortion, Brief of Plaintiffs-Appellees in Zbaraz at 7-8, the Hyde Amendment will increase expenditures dramatically, and cannot, therefore, come within the Holman Rule. As Mr. Justice Stevens correctly observed in denying the state's application for a stay in Williams v. Zbaraz, "it is less expensive for the State to pay the entire cost of an abortion than it is for it to pay only its share of the costs associated with a full term pregnancy." U.S. , 99 S.Ct. 2095, 2098 (1979).

Negro shall be paid a government salary" would be unreviewable by the courts. 14 U.S.L.W. 3379, 3380 (U.S. May 7, 1946). The same must be conceded here.10/

In Lovett, Congress attempted to avoid judicial review of a measure to prevent certain politically unpopular persons from holding government employment by labeling its action a "mere appropriation measure." 328 U.S. at 313-14. Here, self-appointed congressional spokesmen assert the appropriations label to insulate from review an act deliberately designed to prevent certain women from obtaining politically unpopular, though medically necessary, abortions.

10/ The circumstances of Lovett and McRae are strikingly similar. Writing for the majority in Lovett, Justice Black examined the legislative history and political background of the challenged measure, noting a preoccupation with "subversives" in the House of Representatives to such an extent that "it became the practice to include a ... prohibition [of "subversives" in federal employment] in all appropriations acts...." 328 U.S. at 308. The bill, proposed by the House, was opposed by the Senate, and, after the conference deadlocked, was finally enacted only because the House threatened to hold hostage the entire wartime appropriation without it. Id. at 312-13.

This Court firmly rejected the appropriations argument in Lovett:

> Were this case to be not justiciable, Congressional action, aimed at three individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, "...a limited Constitution ...[is] one which contains specified exceptions to the legislative authority.... Limitation of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." Federal Paper No. 78.

328 U.S. at 314.

Similarly, here, as the district court points out, Congress cannot "determine the validity of [its] own laws by framing them as funding laws." Slip op. at 291. Moreover, to permit it to do so would nullify the power and duty of the Supreme Court to enforce and interpret the Constitution as the supreme law of the land. Marbury v. Madison, 1 Cranch 137 (1803).

Intervenors also argue that plaintiffs'

claims are not justiciable because they present a political question. (See Int-Def. Brief at 29-33.) However, this Court, as the "ultimate interpreter of the Constitution," has refused to find even the exercise by the House of Representatives of its power to judge the qualifications of its own members a non-justiciable political question. Powell v. McCormack, 395 U.S. 486, 521 (1969). Lovett makes clear that, notwithstanding Article I, section 9, clause 7, appropriations are also justiciable. Plainly, none of the criteria in Baker v. Carr, 369 U.S. 186, 217 (1962), warrants a finding that the Hyde Amendment is a political question.

Lovett does not support the suggestion that this Court, upon finding the Hyde restrictions unconstitutional, must or even could remand to Congress for further review of the question. The opinion in Lovett concludes:

> Much as we regret to declare that an act of Congress violates the Constitution, we have no alternative here. Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett,

> Watson, and Dodd. The judgment in their favor is affirmed.11/

328 U.S. 318. There is absolutely no suggestion that the Supreme Court considered the judgments in Lovett in any way contingent upon further congressional action. Indeed, if the Court believed its judgment was merely contingent upon congressional acceptance or rejection, the opinion would be merely advisory and outside the jurisdiction of an Article III court. Muskrat v. United States, 219 U.S. 346, 362 (1911); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792).

That Congress did in fact decide to appropriate the funds ordered by the Court in Lovett does not support the suggestion

---

11/ The judgment in the Court of Claims affirmed by this Court concluded: "Plaintiff Robert Morse Lovett in case No. 46026 is entitled to recover $1,996.40; plaintiff Goodwin B. Watson in case No. 46027 is entitled to recover $101.78; and plaintiff William E. Dodd, Jr. in case No 26028 is entitled to recover $59.83. Judgments will be entered accordingly. It is so ordered." 66 F.Supp. 142, 148 (Ct. Cl. 1945).

of the Amici that the Court must, or even could, remand a case to the Congress for it to determine whether to take the Supreme Court's advice as to the constitutionality of an appropriations restriction.12/

12/ Lovett returned to the Congress only because it began as an action in the Court of Claims for money owing, and at that time, it was unclear whether the Court of Claims was an Article III Court, or an Article I, legislative court. See Williams v. United States, 289 U.S. 553 (1933). In the Supreme Court, all parties treated the Court of Claims judgment as final and judicial because all sought Supreme Court review on the merits. It was only after remand from this Court that the Article I legislative aspect of the judgment became apparent. See Ely, "United States v. Lovett: Litigating the Separation of Powers," 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1, 8-10 (1975). Ely observes that "authority for the proposition that Article I, section 9 renders appropriations orders immune from judicial review was of less than overwhelming force." Id. at 18. He found the brief of the Congress "subject to several criticisms. The opening argument that the constitutional claims were not justiciable got it off to a weak start. As noted above, the argument was not intrinsically strong, and it had unceremoniously been brushed aside by the Court of Claims." Id. at 26. However, that issue is not even presented in this case; the district court is an Article III court not subject to the review or supervision of Congress.

Just last term in Califano v. Westcott, 99 S.Ct. 2655 (1979), the Court explored the issue of judicial remedies for unconstitutional exclusions and conditions in government benefits programs. Both the majority and dissenting opinions cite Mr. Justice Harlan's statement of the issue:

> Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Welsh v. United States, 398 U.S. 333, 361 (1970)(concurring opinion). Cited in Califano v. Westcott, 99 S.Ct. 2663 (Mr. Justice Blackmun) and 2666 (Mr. Justice Powell).

The test to determine whether extension or invalidation is the proper remedy for a constitutionally infirm statute is "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it...to render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. at 355-56. In determining which of these remedies Congress would prefer, several factors are relevant, including

the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying statutory program and the amount of disruption to the statutory scheme that might accompany extension on the one hand or invalidation on the other. An analysis of these factors in this case ineluctably supports the remedy ordered by the district court, i.e. striking the exclusion of Medicaid benefits for medically necessary abortions.

Congress has specifically provided that extension is the proper remedy where limitations or conditions upon entitlements created by the Social Security Act are held unconstitutional. Section 1103 of the Social Security Act, 42 U.S.C. §1303, provides that, in the event "any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the Chapter and the application of such provision to other persons or circumstances shall not be affected thereby." Consistent with this provision, this Court has uniformly extended benefits whenever a congressional restriction upon Social Security Act benefits has been found unconstitutional. Califano v. Westcott, 99 S.Ct. 2655 (1979)

(benefits to children of unemployed mothers); Califano v. Jablon, 430 U.S. 924 (1977) aff'g 399 F.Supp. 118 (D.Md. 1975)(old-age or disability benefits to husbands of wage-earning wives without dependency requirement); Califano v. Goldfarb, 430 U.S. 199 (1977)(survivors benefits to male spouses without dependency requirement); Weinberger v. Weisenfeld, 420 U.S. 636 (1975)(benefits to surviving father of minor children based on earnings of deceased wife); Jimenez v. Weinberger, 417 U.S. 628 (1974)(benefits to illegitimate children born after onset of parent's disability who are dependent on disabled parent); Graham v. Richardson, 403 U.S. 365 (1971)(welfare benefits to resident aliens and aliens who have not resided in U.S. for a specified number of years); Shapiro v. Thompson, 394 U.S. 618 (1969)(benefits under AFDC program to all otherwise-eligible recipients in state regardless of length of residency).

The normal, indeed invariable, rule in public benefit cases has been to extend benefits to the excluded class rather than to invalidate the entire program. In addition to the Social Security Act cases cited above, this Court has followed the practice

of restoring unconstitutionally excluded benefits in a variety of other government benefit cases. See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (medical care to all indigents regardless of length of residency); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamps to households of people unrelated by blood or marriage in the face of explicit congressional desire to exclude such groups); Frontiero v. Richardson, 411 U.S. 677 (1973)(benefits to dependents of service women which are provided to dependents of service men); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973)(per curiam)(benefits extended to illegitimate children of working poor under state program). This Court has never ordered that an unconstitutional condition or exclusion in a government benefit program be remedied by invalidating the entire program.

Califano v. Westcott, supra, affirms the correctness of this consistent line of authority. There, both the majority and dissenting opinions agreed that providing benefits to children of unemployed fathers,

but not unemployed mothers, was an unconstitutional exclusion; and both affirm the judicial power to extend benefits to unconstitutionally excluded groups. The difference between the majority and dissent in Westcott rests on their reading of congressional intent with respect to appropriate remedy. The majority upheld the extension of benefits because not only was it "the simplest and most equitable" solution possible, 99 S.Ct. at 2655, but an injunction suspending the program's operation would impose hardships on beneficiaries whom Congress plainly meant to protect. (Three hundred thousand needy children would have been deprived of the basic necessities of life.) 99 S.Ct. at 2664. The dissent, on the other hand, interpreted the primary intent of Congress at the time the gender classification was made to be to limit benefits in the interest of conserving public funds, and therefore would have "enjoined any further payment of benefits under the provision found to be unconstitutional," i.e. the entire AFDC-U program. 99 S.Ct. 2666.

This case is similar to Westcott in that in both there is plain evidence of

congressional intent to deny benefits to the excluded groups.[13/] To the extent that this case differs from Westcott, these differences make the appropriateness of extension more plain here. In Westcott, the extension of benefits represented a significant increase in cost.[14/] Here, by contrast, striking the Hyde restrictions saves public funds. (See n.6, supra.) Nullification of Medicaid, or of the HEW/Labor Appropriations Act, would have an even more immediate and devastating impact upon millions of patients, and thousands of physicians and hospitals. It is beyond belief that Congress would prefer that result. Neither Congress nor a single state chose or even debated that option after the Hyde Amendment was first enjoined in 1976.

13/ The intervening-defendants' attempt to distinguish Westcott on the ground that the "Court could infer that Congress would have preferred to benefit the excluded class" is fallacious. Int-Def. Brief at 28. In Westcott the exclusion was adopted in 1968 as part of a general statutory revision "to tighten standards for eligibility and reduce program costs." 99 S.Ct. 2655.

14/ In Westcott, Massachusetts estimated that the extension of AFDC-U benefits to families where the mother was unemployed would cost an additional $21.5 million, while the existing program for families with an unemployed father cost $30 million. Brief for Appellant Sharp at 36.

III. NONE OF THE ISSUES RAISED BY DEFENDANTS RESPECTING THE FIRST AMENDMENT CLAIMS HAS MERIT.

A. Plaintiffs-Appellees Have Standing To Challenge the Hyde Amendment Under The Free Exercise Clause.

For the first time in this litigation, the government specifically challenges plaintiffs' standing to raise the free exercise claims. The issue is a false one. There is no question that the Women's Division of the Board of Global Ministries of the United Methodist Church (hereinafter "Women's Division" or "Division") has standing to represent those members of plaintiffs' class with free exercise concerns.[15/] The Solicitor's argument confuses traditional and introduces novel propositions of a purely prudential nature.

15/ After trial, the district court certified the plaintiffs' class as including "women of all religious and non-religious persuasions and beliefs who have in accordance with the teaching of their religion and/or the dictates of their conscience determined that abortion is necessary." (A.92-94).

Although the government does not challenge the district court's findings that a woman's decision to seek a medically necessary abortion may be dictated by her religious convictions, Brief of the Secretary at 31-32, n. 17, it suggests in a footnote that it was

(footnote continued on next page)

The Women's Division has clear standing to represent its members whose free exercise rights are infringed by the Hyde Amendments. It is settled that an organization can represent its members where:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germaine to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

It is undisputed that the membership of the Women's Division includes women who could sue in their own right. The uncontested testimony of Theressa Hoover, Associate General Secretary and Chief Executive Officer of the

---

(footnote continued from preceding page)

improper for the district court to base these findings on the testimony of religious representatives. This contention not only ignores the effect of the stipulation but also the fact that theological testimony and writings are frequently the most important source of illumination of religious belief. See: Wisconsin v. Yoder, 406 U.S. 205, 209-213 (1972); United States v. Seeger, 380 U.S. 163, 180-183 (1965); cf. School District of Abington v. Schempp, 374 U.S. 203, 209-210 (1963).

Women's Division is that the Women's Division counts among its members "pregnant Medicaid eligible women who, as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment ..." (A. 132).[16] This gives the Division standing to raise those members' claims. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 685-88 (1973); Sierra Club v. Morton, 405 U.S. 727, 739 (1972). It also satisfies the strict test of coercive effect on individual free exercise stated in School District of Abington v. Schempp, 374 U.S. 203, 223 (1963); Board of Education v. Allen, 392 U.S. 236, 249 (1968). There is no requirement, as the Solicitor would have it, that a particular class member be identified or joined as a plaintiff to establish representational standing. Brief of the Secretary at 34.

16/ The government stipulated that her affidavit would be admitted into evidence. (R. 119).

The Solicitor does not and cannot assail the community of interest between the Division and its members. The Division's interest in protecting the exercise of religious liberty from governmental interference is obviously central to its purpose as a religious organization. Affidavit of Theressa Hoover, ¶¶3,6, (A. 130, 131). See: Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 344. Rather, he contends that because the rights asserted are "personal" the Division should not be allowed to represent its members. Brief of the Secretary at 34-35.[17/]

17/ Because the record establishes the existence of Division members who are threatened with, and suffer immediate harm as a result of, implementation of the Hyde Amendments, there is no question that the "personal stake in the outcome," the prerequisite to an Article III case or controversy, is established. Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). The Solicitor's contention, that individual women would be better plaintiffs than the Division, is only prudential and cannot be raised at this late date after "an authoritative constitutional determination" and in circumstances where "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently.'" Craig v. Boren, 429 U.S. 190, 193-94 (1976). In addition, the prudential argument should be considered waived under Fed. R. Civ. P. 12(h). Although lack of standing generally was pled in the Secretary's Answer to the Amended Complaint, ¶17/R.101, and rejected below, slip op. at 281-283, the government never raised the specific free exercise standing question pressed here, even in response to the class certification order. Compare Craig v. Boren.

The fact that the substantive right affected is personal neither requires individualized proof nor warrants departure from the settled principles of associational standing. NAACP v. Alabama involved the exercise of equally personal First Amendment rights. 357 U.S. 449 (1958). There is also no need for individualized proof in order for the members to obtain the wholly prospective relief sought. Warth v. Seldin, 422 U.S. at 515-516; Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 344. The Division seeks to enjoin a categorical exclusion which impedes its indigent pregnant members from implementing the principles of responsible parenthood and therefore, "it can reasonably be supposed that ... [invalidation of the Hyde Amendments] will inure to the benefit of those members of the association actually injured." Warth v. Seldin, 422 U.S. at 515.[18/]

18/ This case is different from the conscientious objector cases where the law requires assessing the nature of the belief and the sincerity of the individual applicant, regardless of his religious affiliation. United States v. Seeger, 380 U.S. 163, 185 (1965). Even if such an individualized assessment were required here, as the intervening defendants erroneously contend, see III, B, infra, the Division could still appropriately represent its members' interest in removing the absolute preclusion.

Finally, the Solicitor confuses associational standing with jus tertii when he argues that organizational standing should be permitted only if there is a "compelling reason why the members of a religious organization cannot speak for themselves ..." Brief of the Secretary at 35. See: Singleton v. Wulff, 428 U.S. 106, 115-116 (1976). Although this consideration underlay the early recognition of associational standing in NAACP v. Alabama, 357 U.S. at 489, it has never been a test of organizational standing. See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). The Court implicitly rejected a similar contention in Hunt where it was urged that the members represented were "under no disabilities which prevent them from coming forward to protect their own rights ..." 432 U.S. at 342. Indeed, such a test would vitiate the concept of organizational standing. It would be particularly anomalous to impose such a test where the Religion Clauses are involved given the importance of raising these issues. See: Flast v. Cohen, 392 U.S. at 103-104.

Nonetheless, for the reasons recognized by the Court in Singleton v. Wulff, there are many obstacles to a woman's assertion of her

own rights in an abortion case. 428 U.S. at 117. The need for representational standing is greater here. If the Division's standing were not recognized, free exercise rights in the abortion context would routinely be chilled rather than judicially vindicated.[19/]

[19/] Since the Division's standing to represent its members is so clear, plaintiffs-appellees simply note that it also has standing in its own right to raise both establishment and free exercise issues given their close nexus in this case. Cf. Flast v. Cohen, 392 U.S. at 102-104, n. 25; Engel v. Vitale, 370 U.S. 421, 430-431 (1962). The Division is directly injured because the Hyde Amendment disparages its moral beliefs in abortion and impedes the efficaciousness of its teaching through burdening its indigent members. Moreover, as a member of the Religious Coalition for Abortion Rights, the Division has expended economic and personal resources to combat the Hyde Amendment. Affidavit of Theressa Hoover (A.130). Whereas the Court has not considered whether the costs of fighting a law justify standing, the special concerns of the Religion Clauses warrant recognizing, as demonstrative of the requisite stake in the outcome, expenditures by a religious organization to protect the free exercise rights of its members. Cf. Flast v. Cohen, 392 U.S. at 103-104. In addition, the Division's standing to raise the establishment clause violation and special relationship to its members qualifies it under the principles of jus tertii. Singleton v. Wulff, 428 U.S. at 114-119.

B. Defendants' Arguments Ignore the "Governmental Obligation of Neutrality" Imposed Where Religious Liberty is at Issue.

Defendants' remaining contentions completely ignore the "'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." Maher v. Roe, 432 U.S. at 474, n. 8. Plaintiffs-appellees' claim is not that "the government must bear the cost of each person's religious observances," Brief of the Secretary at 36, but rather that in the context of the Medicaid program the government cannot exclude those whose religious and conscientious convictions require recourse to medically necessary abortion while covering those whose religious beliefs dictate childbirth or some other form of medically necessary service. See: Sherbert v. Verner, 374 U.S. at 406.[20/]

20/ Oddly, the Solicitor never even cites Sherbert, although it was specifically distinguished by this Court in Maher, 432 U.S. at 474, n. 8. The intervening defendants distort it. Int.-Def. Brief at 52, n. 11. The rule in Sherbert denied benefits to those who would not work on Saturday for any reason. The rule here denies benefits to all those who need medically necessary but non-life endangering abortions.

(footnote continued on next page)

Defendants' suggestion, Brief of Secretary at 38, and Int.-Def. Brief at 52, that non-discriminatroy funding of medically necessary abortion in accordance with religious or conscientious convictions would constitute an establishment of religion was squarely rejected by this Court in Sherbert, 374 U.S. at 409. Funding in accordance with religious convictions -- whether they counsel "conscientious decision" or "conscientious nonparticipation," slip op. at 328--is a basic principle of the Medicaid program and

---

(footnote continued from previous page)

Contrary to the intervening defendants' suggestion, the rule in Sherbert did not deny benefits because of the plaintiff's Sabbatarian practice but in spite of it. There, as here, the rule affects religious practice indirectly; and, here as there, the First Amendment requires funding where the effect of ineligibility is to coerce abandonment or penalize the free exercise of religion, particularly where contrary beliefs are not so constrained.

Norwood v. Harrison, 413 U.S. 455 (1973), relied on in Maher at 477, for the proposition that state aid to private schools is not required simply because public school education is provided, is inapposite here. Maher paralleled Norwood insofar as the claim to funding for elective abortion represented extension of the program to encompass a private choice not otherwise within the Medicaid program. This case, however, involves funding for a medically necessary service which, before the Hyde Amendment, was an included service. The discrimination here cannot be justified by a private/public distinction. The discrimination in this case is in the public program itself.

"reflects nothing more than the governmental obligation of neutrality in the face of religious differences ..." Sherbert, 374 U.S. at 409.[21]

There is absolutely no conflict between the accommodation of religious differences in the context of the Medicaid program and the no establishment principle. Id.[22]

Abortion is simply a secular medical

---

[21] 42 U.S.C. §1396f, which was included in Title XIX at the request of the Christian Scientists, embodies the principle that no person shall be compelled to accept medical service which violates their religious beliefs. In most cases, alternative care is automatically provided by the regular medical personnel or facility involved in treatment. The intent to provide for altnerative care is underscored, however, by Title XIX's inclusion of Christian Science sanitoria, which are outside the normal health care channels. 42 U.S.C. §1396d.

In the related context of family planning, Congress requires that participation be strictly voluntary. 42 U.S.C. §300a-5. The debates make clear the concern to protect individual decisions of conscience. 116 Cong. Rec. 24092, 24097, 37375, 37384-86 (1970). 42 U.S.C. §300a-7, relating to provision of abortion and sterilization in federally supported hospitals, mandates respect for conscientious convictions, whether or not they could be shown to be religiously grounded.

[22] By contrast, the free exercise demand for parochial school funding is readily distinguishable on

(footnote continued on following page)

service; it is not equivalent to a religious rite or a Bible. That it may be chosen in accordance with religious belief is as irrelevant to Establishment Clause concerns as is the Medicaid coverage provided for religiously dictated, albeit dangerous childbirth or the alternative care necessitated by a Jehovah Witness' refusal to have a blood transfusion. Even with respect to parochial schools, the state may fund secular welfare services so long as they are clearly separable from the religious mission of the institution. See, e.g., Everson v. Board of Education, 330 U.S. 1, 17-18 (1947); Wolman v. Walter, 433 U.S. 229, 242-244 (1976).

(footnote continued from previous page)

a number of grounds. First, it is similar to the claim rejected in Norwood that the state cannot prefer a public school program to a private one. See n. 20 supra at 40. The important and clearly secular function of the public schools in our pluralistic society is indisputable. See Everson v. Board of Education, 330 U.S. at 23-24 (Jackson, J., dissenting); School District of Abington v. Schempp, 374 U.S. at 241-242 (Brennan, J., concurring). Second, for the state to assist the parochial schools generally would constitute aid to a religious institution in violation of the Establishment Clause. See, e.g. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). Conversely, funding of secular medical services in accordance with the dictates of conscience does not advance any one belief but respects all. Third, the indisputably secular reasons for maintaining a public school system distinguish it from the Hyde Amendment's preference for the fetus over maternal life and health, which reflects a primary purpose and effect to advance the religious tenet that views abortion as murder.

The principle that no state may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation," Everson, 330 U.S. at 16 (emphasis in original), prohibits distribution of aid which discriminates, directly or indirectly, between different religious positions. Sherbert, 374 U.S. at 410. The preference for childbirth over medically necessary abortion includes the Catholic or Lutheran because of their faith, while excluding the United Methodist and others because of theirs. It is as if the state provided diagnostic health services only to children who, for reasons of faith, education, or convenience, attend Catholic schools, while denying such service to those attending Quaker schools.

The intervening defendants' contention that the Free Exercise Clause does not protect religiously-grounded conscientious decisions "when they are not mandated by specific and affirmative corporate tenets of some religious group," Int.-Def. Brief, p. 50, also offends the guarantee of neutrality. They suggest that a religiously mandated course of

conduct is protected by the Free Exercise Clause, whereas a religious duty to make an individual conscientious decision is not. Such a distinction, however, would impermissibly prefer categorical dogma over conscientious faith.[23/] In Gillette v. United States, 401 U.S. 437 (1971), the Court squarely recognized that conscientious belief is protected by the Free Exercise Clause.[24/] Cf.: United States v. Seeger, 380 U.S. 163, 176 (1965).

The preference suggested by the intervening defendants would not only ignore the diversity of modern religious thought and

---

23/ Thus, as the intervening defendants' witness, Father Smith, testified, a reverse Hyde Amendment, which funded only abortion, would burden the free exercise of the observant Catholic because abortion is absolutely forbidden. (A. 231-233). Moreover, the distinction between categorical and conscientious faith is inherently false because one who claims protection for a dogmatic position has opted, whether consciously or unconsciously, to accept rather than reject the mandated course.

24/ The petitioner Negre claimed that participation in the Vietnam War violated his free exercise as a Catholic because he had made an individual conscientious determination in accordance with his faith that that war was unjust. His claim was rejected because of overriding neutral and legitimate interests, not because his objection was conscientiously as opposed to categorically determined. 401 U.S. at 440-441, 461.

practice, cf.: Torcaso v. Watkins, 367 U.S. 488, 495 (1961); United States v. Seeger, 380 U.S. at 180-183 (1965), but also the fundamental principle of the First Amendment that religion must be voluntary.[25] This means not only that the state may not augment religion's power to persuade, Walz v. Tax Commission, 397 U.S. 664, 667-669 (1970); School District of Abington v. Schempp, 374 U.S. at 262-263 (Brennan, J., concurring); it also means that the state may not prefer those religions which dictate the religiously-required course over those which remand the decision to voluntary, conscientious determination by the individual.[26]

25/ In the Memorial and Remonstrance, Madison wrote: "... Religion ... must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Everson v. Board of Education, Appendix, 330 U.S. at 64 (Rutledge, J., dissenting).

26/ The forces which led the struggle for the First Amendment -- the Baptists, Protestant Evangelicals, the Deists and Rationalists -- attest to the cardinal nature of the principle of voluntarism matters of individual conscience. L. Pfeffer, Church, State and Freedom, 88-93 (1953).

The theological testimony, from both sides of the abortion controversy, demonstrates that the duty conscientiously to consider abortion is as fundamental, grave and sacred a concern for those of the pro-choice religions as the duty absolutely to reject abortion is for those of the anti-abortion faiths. Either way, this duty ranks among the highest obligations of the believer. Brief of Appellees, Facts, §9. The district court correctly held that both are entitled to equal protection under the Fifth and First Amendments.

The final contention of the intervening defendants is that proper relief under the Free Exercise Clause requires "fashion[ing] an exemption for bona fide members of those religious organizations which mandate abortion." Int-Def. Brief at 53. The suggestion is completely untenable as well as inconsistent with the "governmental obligation of neutrality." Here, the proper remedy under the Free Exercise Clause is not individualized exemption, but invalidation of the Hyde Amendments.

First, there is no place for such a test in a Medicaid scheme which has, as a general operating principle, respect for religiously

based and conscientious convictions.[27] The Medicaid program implements this principle without the intervention of special boards to test the sincerity of anyone's convictions. To set up a special procedure for women whose religious convictions dictate refusal of childbirth and the necessity of abortion services would impermissibly single out one class of recipients for special treatment.

The discriminatory nature of a sincerity test for medically necessary abortions is particularly pointed. Those whose religious or conscientious convictions preclude considering abortion would be unqualifiedly eligible for Medicaid reimbursement for prenatal care and childbirth. Congress cannot, consistent with the principles of free exercise neutrality and equal protection, discriminate by burdening some religious and conscientious beliefs with a test of sincerity and not others. See Everson v. Board of Education, 330 U.S. at 15-16 (1947).[28]

27/ See n. 21, supra at 42.

28/ In United States v. Seeger, all claimants, regardless of religious background, must qualify for objector status. 380 U.S. at 185. In Sherbert, individualized exemption was required for Saturday worshippers just as it would be for Sunday observers who would otherwise be required to work on that day during a period of national emergency. 374 U.S. at 406.

The fact that a public benefit is involved does not permit imposition of a religiously based test of eligibility. See: Speiser v. Randall, 357 U.S. 513, 518 (1958). The school prayer decisions recognize that an exemption process may carry a stigma which "operates to pressure conformity," School Board of Abington v. Schempp, 374 U.S. at 288-290 (Brennan, J., concurring); Engel v. Vitale, 370 U.S. at 431. Given that the Hyde Amendment embodies an explicit moral condemnation of the decision to have an abortion rather than undergo a health-threatening pregnancy, the chilling effect of a sincerity test is obvious. Even assuming that such a test could pass muster under the Establishment Clause, see: Torcaso v. Watkins, 367 U.S. 488, this infringement of religious liberty is impermissible since encouraging childbirth at the cost of maternal health is not necessitated by any "serious danger to the public safety." Speiser v. Randall, 357 U.S. at 527. See: Roe v. Wade, 410 U.S. at 163-164.

The First Amendment burdens of a sincerity test are compounded because it would dangerously delay access to abortion. In Doe v. Bolton, this Court struck down far less onerous screening and approval procedures as lacking substantial jurisdiction. 410 U.S.

179, 197-199 (1973). It is one thing to constitute a board of physicians regularly at the hospital; it is another to constitute a board of appropriate ministers or others purportedly qualified to test the sincerity of the convictions of those women who seek abortion. Putting aside even the religiously discriminatory nature of an exemption, the intervening defendants' suggestion is completely unjustifiable.

In sum, even-handed respect for religious and conscientious conviction recognized by Congress and required by the First and Fifth Amendments can be guaranteed only by invalidating the Hyde Amendments.

C. The Hyde Amendments Do Not Merely Parallel The Religious Belief That The Fetus Is Human Life; They Embody and Advance It.

Of the defendants, only the Solicitor addresses the Establishment Clause issue. His suggestion that the Hyde Amendments parallel rather than embody the religious doctrine that abortion is murder ignores the factual findings of the district court and the settled principles established by this Court.

The Solicitor selectively quotes McGowan v. Maryland, 366 U.S. 420 (1961), for the obvious proposition that simply because a law coincides with a religious tenet does not create an establishment problem. Brief of the Secretary at 28-29.[29/] He omits, however, the sentence underlined below which joins the two passages he quotes and which states the applicable test of secular purpose:

> [T]he "Establishment" Clause does not ban federal or state regulation

---

29/ It is also obvious that a clever turn of phrase cannot reduce the Hyde Amendment into a law which merely "provokes different reactions among religious groups" or "elicits greater approval from one religious denomination or sect than from another." Brief of the Secretary at 29.

> of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal ...

366 U.S. at 442.[30/] The district court's findings of fact preclude the legal conclusion that there is a secular purpose for the Hyde Amendment "wholly apart" from the religious belief that an inviolable human being is created at conception. Brief of Appellees, Facts, §§10, 11, 12.

The test is not, as the government suggests, whether the belief is exclusively religious[31/] or solely attributable to one

---

30/ Justice Frankfurter, concurring, explains that if "all secular ends which ... [a law] purportedly serves are derivative from, not wholly independent of, the advancement of religion--the regulation is beyond the power of the state." Id. at 466.

31/ Sacred and secular concerns are rarely wholly exclusive of one another. St. Thomas Aquinas said of theology that it "uses for its service all the other sciences, as though its vassals." Aquinas, Prologue to Commentary of IV Books of Sentences, reprinted in An Aquinas Reader (M. Clark, ed. 1972) at 411, cited

(footnote continued on next page)

church.[32/] Brief of the Secretary at 29. Rather, it is whether there is a substantial

---

(footnote continued from preceding page)

in Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring). Conversely religiously enjoined practices do not spring from revelation alone, but respond to concrete secular concerns; for example, even in their origin, the kosher laws or the command to keep the Sabbath were necessary to health and social well-being. See, e.g.: McGowan v. Maryland, 366 U.S. at 489, n. 57.

By the same token, the preaching and acceptance of religious doctrine equating fertilization with the divine creation of a human being may be influenced by biological or philosophical considerations; or it may serve to enforce a strict code of sexual morality. But such influences or purposes do not make the belief that the fetus is human life -- pressed as a matter of divine truth and law in the drive to stop abortion -- any less religious or offensive to the Establishment Clause. See: Committee for Public Education v. Nyquist, 413 U.S. 756, 783 (1973), citing School District of Abington v. Schmepp, 374 U.S. at 278-281 (Brennan, J., concurring); Malnak v. Yogi, 592 F.2d at 209.

32/ The plaintiffs have not, as the government suggests, argued that the Hyde Amendment enacts only Roman Catholic doctrine. The belief that the fetus is human life is shared by a number of denominations, as well as by some religious individuals dissenting from their denomination's position. Brief of Appellees, Facts, §9(a), (c). The dominance of the Roman Catholic Church in the anti-abortion movement and its essential role in generating the pressures that produced the

(footnote continued on next page)

secular concern which is wholly independent, not simply derivative, of the religious concern. Applying that test, this Court has looked to the relative importance or the predominance of the religious as opposed to secular concerns[33/] and has struck down laws as impermissibly religious where, despite secular purposes, the religious purpose was pervasive.[34/]

(footnote continued from preceding page)

Hyde Amendments should not be confused with exclusivity. Id. at §11(a). The record also demonstrates that the "right to life" effort embraces different religious traditions and is, itself, a religious movement. Id. at §§9(a), (c), 11(b).

33/ McGowan found the secular concerns not only distinct but unquestionably predominant. 366 U.S. at 444-445, 448-449 and 497, 504 (Frankfurter, J., concurring). Indeed, if a law could pass the secular purpose test simply because of some minor secular purpose, it would hardly have been necessary to trace so painstakingly the history of the Sunday closing laws, since their recreational purposes are plain on their face. 366 U.S. at 423-424.

34/ In School District of Abington v. Schempp, the majority rejects the school board's contention that Bible reading serves secular purposes among which are "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S. at 223. The Court views the practice as

(footnote continued on next page)

The Solicitor appears to suggest that Epperson v. Arkansas, 393 U.S. 97 (1968), applies a stricter test, requiring that there be absolutely no secular justification but rather a wholly religious one. Id. at 107-108. Brief of the Secretary at 29, n. 15. But Epperson involved no greater influence of religious belief than this case.

In Epperson, the State of Arkansas asserted as secular a purpose very similar to that put forward here: the right to withdraw (from the curriculum) a highly controversial and disruptive subject in order, purportedly, to remain neutral. 393 U.S. at 113 (Black, J., concurring). Brief of the State of Arkansas at 30, Epperson v. Arkansas. The majority recognized that neutrality was not a wholly independent secular purpose but a reflection of the religious views of some

---

(footnote continued from preceding page)

religious in character, even if its purposes are not "strictly religious," because "the place of the Bible as an instrument of religion cannot be gainsaid" and the law evidenced recognition of the "pervading religious character of the ceremony." Id. at 224 (emphasis added).

citizens. 393 U.S. at 107.[35] The "traditionalist" label, used by both the Solicitor and the district court to characterize the anti-abortion view, slip op. at 323-324; Brief of the Secretary at 28-30, does not obscure the religious nature of a law any more than does the label of "neutrality." The belief that conception is the creation of a human being is as religious as the creationist view of the world enacted in the Epperson law, and characterized in its time as traditionalist.[36]

35/ It is also pointedly parallel that it was claimed in Epperson that taxpayers should not be coerced into financing the teaching in the public schools of a view which was to them heretical and evil. 393 U.S. at 99, n. 3, 108, n. 16. The same rationale was used a generation earlier to support the conclusion that the identical Tennessee law was "purely an act of neutrality." Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 369 (1927) (Chambliss, J., concurring).

36/ Here again, comparison between Epperson and Scopes is especially instructive. The Scopes majority rejected the claim that the law established religious belief because of the absence of unanimity on the subjects of evolution and creation within any religious tradition. 289 S.W. at 367. Justice Chambliss, concurring, upheld the law because a non-theistic theory of evolution is "inconsistent, not only with the common belief of mankind of every clime and creed and 'religious establishment,' ... but inconsistent also with

(footnote continued on next page)

The government also obscures another principle of Establishment Clause analysis -- i.e., that the inquiry into secular purpose must be based in the present and not the past. McGowan warns against transferring a finding of clear secular purpose from one case to another:

> Finally, we should make clear that this case deals only with the constitutionality of §521 of the Maryland statutes before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose -- evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect -- is to use the state's coercive power to aid religion.

366 U.S. at 453. In other words, if in response to a perceived danger of declining religious observance a movement developed which succeeded in eliminating the recreational exceptions in the Sunday closing laws, the Court would have to examine the establishment claim afresh.

(footnote continued from preceding page)

our Constitution and the fundamental declaration lying back of it, through all of which runs recognition of and appeal to 'God.'..." Scopes v. State, 289 S.W. at 368.

Roe v. Wade's historical examination demonstrates that whereas the nineteenth century criminal abortion laws were justified by the clearly secular purpose of protecting maternal health, the only purpose for limiting abortion today is the asserted interest in fetal life. 410 U.S. 113, 147-153 (1973). Distinguishing the legitimate interest in the fetus as potential human life, 410 U.S. at 159-163, Roe v. Wade allowed no sacrifice of maternal health to potential human life, and Maher v. Roe reaffirmed this principle. 432 U.S. at 472. Here, Congress exacts this very sacrifice and makes clear that the Hyde Amendments are rooted in the single belief, from which all other arguments are derived, that the fetus is actual human life.

The question is whether describing this belief as "traditionalist" meaningfully distinguishes it as wholly secular. Although McGowan makes clear that the answer to this question must ultimately be found in the present, it is notable that restrictions on abortion based on the protection of fetal life have traditionally been "inextricably intertwined" with religious notions of animation or ensoulment. Cf. Lemon v. Kurtzman, 403 U.S. 602, 616-617 (1971); Meek v.

Pittenger, 421 U.S. 349, 366, 370-372 (1975). The government cannot invoke either the Pythagorean school of Greek ethical philosophy or the exponents of the English common law as "secular sources." Brief of the Secretary at 30. Edelstein's treatise, The Hippocratic Oath, relied on in Roe v. Wade, makes clear that the Oath was not an expression of medical ethics but of the Pythagorean school's dogmatic religious belief concerning ensoulment.[37/] 410 U.S. at 131-132. Roe v. Wade also recognizes that the quickening distinction in the common law also embodied notions of animation or ensoulment. 410 U.S. at 132-136. Far from providing any distinct secular basis for viewing the fetus as actual human life from the moment of conception, these

---

37/ Edelstein writes:

> For the physician, when forswearing the use of poison and of abortive remedies adds: "In purity and in holiness I will guard my life and my art." ... The demand for holiness ... can hardly be understood as resulting from practical thinking or technical responsibility. Holiness belongs to another realm of values and is indicative of standards of a different, a more elevated character.

L. Edelstein, The Hippocratic Oath, 12-13 (1943). Edelstein also points out that the Pythagoreans "held that the embryo was an animate being from the moment of conception." Id. at 16. Contrast different views on animation cited in Roe v. Wade, 410 U.S. at 133, n. 22.

historical sources, as well as more recent ones, underscore the central importance of religious concepts.[38]

Nor can the government escape the force of the record by asserting that the passage of anti-abortion laws following Roe v. Wade was "the product of deeply felt public sentiment and not an outgrowth of the political activities of a single religious group." Brief of the Secretary at 30-31. The record does not support this contention. While plaintiffs did not focus their proof on this period, the record supports only the contrary proposition -- that the primary opposition to liberalization of abortion laws in the late 60's and early 70's was religious.[39] This

---

38/ See: Roe v. Wade, 410 U.S. at 159-161; T. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal," 2 Loyola (L.A.) L. Rev. 1 (1969); L. Tribe, "1973 The Supreme Court-Foreword," 87 Harv. L. Rev. 1 (1973); ALI Model Penal Code §207.11, Comment at 146-151, 156 (Tent. Draft No. 9, 1959).

39/ See, for example, Pl. Exh. 132/T.3193; L.IV-3; Wood, T.3198-3199; Brief of Appellees at 101, n. 144; and Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 93rd Cong., 2nd Sess., on S.J. Res. 119 and S.J. Res. 130," Vol. I (Abortion-Part I) (1974), pp. 153-253, which illustrate the early efforts of the Roman

(footnote continued on next page)

Court can also take judicial notice, as it did in Roe v. Wade, of sources which document the central role of the Roman Catholic Church, together with other religiously motivated groups, in the opposition efforts to prevent or counter liberalization of abortion laws.[40]

In the school prayer context, the Court has rejected analogous contentions that an essentially religious law can be saved from

---

(footnote continued from preceding page)

Catholic Church. The trial court examined the decisive role of the Roman Catholic Church in Minnesota in shaping the political opposition to liberalization. See: Brief of Appellees, Facts, §11(c).

40/ L. Lader, Abortion II (1973); L. Tribe, American Constitutional Law, §15-10, p. 929-930 (1978). We ask this Court to take judicial notice of the following example. Several days before the New York legislature voted in 1972 to repeal that state's liberal abortion law, President Nixon sent a letter to Cardinal Cooke stating: "Recently, I read ... that the Archdiocese of New York, under your leadership, had initiated a campaign to bring about repeal of the state's liberalized abortion laws .... I would personally like to associate myself with the convictions you deeply feel and eloquently express." N. Y. Times, May 7, 1972, at 1, col. 3, and 29, col. 2, cited in Lader, Abortion II, supra at 202. When Governor Rockefeller vetoed the repeal, he explained: "The extremes of personal vilification and political coercion brought to bear on members of the legislature raise serious doubts that the votes to repeal the reform ... represented the will of ... the people." N. Y. Times, May 14, 1972, at 62, col. 3, cited in Tribe, American Constitutional Law, at 930, n. 63.

invalidity under the establishment clause by characterizing it as "traditionalist." In Engel v. Vitale, school authorities urged to no avail that the nondenominational prayer was "based on our spiritual heritage." 370 U.S. 421 at 425 (1962). That the Baltimore law invalidated in Schempp dated from 1905, 374 U.S. at 211, or, indeed, that Bible reading may have been tolerated in the time of the framers, did not save the practice under review. Mr. Justice Brennan, noting the "profound changes" in the religious composition of our society, wrote:

> [O]ur use of the history of their time must limit itself to broad purposes, not specific practices .... By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "a constitution we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

374 U.S. at 241 (emphasis in original).

Likewise here, the Court must base its decision on the centrally religious and highly

charged nature of the present-day restrictions on abortion based on the belief that the fetus is human life.[41/] There is simply no evidence in this record upon which traditionalist morality independent of religious belief can be confidently discerned.[42/] Rather, the facts as found by the district court demonstrate that the present-day effort to restrict abortion -- even in its purportedly secular form -- is impelled by a notion of divine truth and a duty to enact God's law and protect God's creation in the fertilized egg. The record establishes the predominantly and pervasively religious nature -- as well as the impermissible and dangerous

---

41/ See: Tribe, "1973 The Supreme Court-Foreword," supra, n. 38 at 60, at 23, n. 106.

42/ The lower court notes the possibility that right reasoning could lead a person to accept the human life tenet without reference to religious doctrine, but concludes that nonetheless the belief is adamantly asserted as religious. Slip op. at 228. Referring to the debates, the lower court also notes that "much other argument ... in the debates ... was free of religious reference," but cannot say "whether or not the debators were motivated by their religious convictions." Slip op. at 275.

religious effects -- of this effort and of the Hyde Amendments it produced.[43/]

43/ The Solicitor's suggestion that to examine the role of religious groups in the legislative process would impermissibly "chill" religious participation is absurd. Brief of the Secretary, at 31, n.16. Invalidation of the Hyde Amendments under the Establishment Clause in no way threatens the right of religious persons and organizations to participate in the political process. Everyone has a right vigorously to seek to enact their beliefs into law; no one, whether espousing religious belief or racial superiority, has a right to contend that the product of their efforts is above constitutional scrutiny. As Mr. Justice Brennan wrote in McDaniel v. Paty: "The antidote which the Constitution provides against zealots who would inject sectariansim into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best." 435 U.S. 618, 642 (1978)(emphasis added).

Beyond that, religious involvment is relevant in establishment analysis in the rare case where the law at issue and the involvment examined are based on explicitly or intrinsically religious premises which are focal in the dispute, and where the role of religion is predominant. When religion bases political activity on secular premises widely understandable, no question is presented, even if religious institutions predominate. Or where, as is the common case, religious institutions participate alongside substantial, heterogeneous secular constituencies, articulating distinct secular concerns, religious participation does not render the law suspect.

IV. THE INTERVENING-DEFENDANTS' INTERPRETATION OF TITLE XIX IS INCONSISTENT WITH THE PLAIN WORDS OF THE STATUTE, ITS CLEAR LEGISLATIVE HISTORY, THE CONSISTENT REGULATORY INTERPRETATION OF SUCCESSIVE SECRETARIES OF HEW, AND THE POSITION OF THE SECRETARY IN THE PRESENT CASE.

The Secretary takes the position that: "The statute and regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (i.e. that an abortion is medically necessary) and condition (i.e. pregnancy)." U.S. Brief in Zbaraz, at 43-44, n.23. In our opening brief, we relied upon the Brief of Appellees in Williams v. Zbaraz (hereinafter "Zbaraz Appellees' Brief") in support of the contention that the Act and regulations require states participating in Medicaid to include medically necessary physician and hospital services, and prohibit exclusion of medically necessary services. The intervenors here take issue with both the United States and the Appellees in Zbaraz and McRae. In general, the points they raise have been anticipated in the Zbaraz briefs; we restrict our response to points that the Zbaraz

appellees and the United States did not specifically address in their Zbaraz briefs.

The intervenors note (Int-Def. Brief at 77) the canon of statutory construction that effect should be given to every word of a statute. They do not follow their admonition, however, in discussing the requirement of 42 U.S.C. §1396a(a)(13)(B) mandating "inclusion of at least the care and services" listed in 42 U.S.C. §1396d(a)(1)-(5). The Secretary of HEW filed a Supplemental Brief in the Appeal in Rush v. Poythress, No. 77-2542 (Fifth Circuit, April 8, 1980)(hereinafter "Brief of the Secretary in Rush"),[44/] explicating the duties which four statutory provisions impose upon states participating in the Medicaid program: 42 U.S.C. 1396, 42 U.S.C. 1396a(a)(13)(B), 42 U.S.C. 1396a(a)(17), and 42 U.S.C. 1396d(a)(1)-(5). This brief makes plain that "the legislative history of the Medicaid act emphasizes the provision of a minimum program of medical benefits consisting of services within the five

---

[44/] Plaintiffs-appellees are lodging a copy of the Supplemental Brief of the Secretary in Rush with the Court.

mandatory categories listed in 42 U.S.C. 1396d(a)(1)-(5). See 42 U.S.C. 1396a(a)(13)(B)." Id. at 7.

Further, intervening-defendants do not come to grips with the legislative history and language of 42 U.S.C. §1396a(a)(17). See Brief for Zbaraz Appellees at 76-77; U.S. Brief in Zbaraz at 44, n.23. Intervenors' analysis of that statute accordingly rests upon little more than a mischaracterization of this Court's holding in Beal v. Doe, 432 U.S. 438 (1977) and the assertion that because the Act generally limits coverage of services to those that are medically necessary, it somehow must be interpreted to permit the states to limit services to those they consider "reasonable" and "consistent with the objectives" of the Act. See Int-Def. Brief at 77.[45/]

[45/] Intervening-defendants' misunderstanding of Section 1396a(a)(17) makes it unnecessary to respond at any length to their labored effort to establish that the exclusion of medically necessary abortion services is both "consistent with the objectives" of the Medicaid Program, and statutorily "reasonable." Int-Def. Brief at 88-94. Three points only need be made. First, they concede that "countervailing interests or circumstances" may affect the "weight that can or ought

(footnote continued on next page)

This interpretation is flatly rejected by HEW, which concludes that

> the language and legislative history of 42 U.S.C. 1396a(a)(17) indicates that Congress intended to give the states broad discretion to set eligibility-related requirements--e.g., the level of income and resources that individuals could have and still be eligible, or the comparability of financial eligibility requirements

---

(footnote continued from preceding page)

to be given" to the state's interest in "fetal life" under the Act. Int-Def. Brief at 89. In this context, and accepting arguendo, intervenors' construction of Section 1396a(a)(17), the weight assigned to that interest in deciding whether a state must fund medically necessary services under a program whose objective is to provide medically necessary care for the poor is far less substantial than in deciding whether a state must cover elective services under the same program. See Zbaraz Appellees' Brief at 76-77; 81-83. See also id. at 38-58 passim. Second, they effectively concede the insubstantiality of the argument--pressed so vigorously by intervenors in Zbaraz--that the state has any fiscal interest in excluding medically necessary abortion services. See Int-Def. Brief at 89-90. Third, their strenuous effort to equate medically necessary and elective abortions, and to establish that there ordinarily are equally effective alternative forms of treatment to medically necessary abortions simply ignores the record in this case, and in Zbaraz. See A.149, 297; Zbaraz Appellees' Brief at 13-20, Point I, Sec. B, supra.

> for each categorical group of Medicaid recipients--but that Congress did not intend to authorize the states to exclude types of medically necessary services from coverage.... [Thus] states must pay for all medically necessary types of services falling within the mandatory categories unless Congress relieves them of that responsibility by adopting its own funding restrictions. Brief of the Secretary in Rush at 7.

Intervening-defendants assert that the phrase "necessary medical services" in the Preamble to the Medicaid Statute, 42 U.S.C. §1396, refers to the class of persons who need assistance, rather than the nature or scope of the services mandated to be provided by the states. Int-Def. Brief at 69. Official HEW position is that "the phrase 'necessary medical services' does not have such a limited application. Rather, it constitutes "the legislative statement of the purpose of the Act," and defines the medically necessary services as the "irreducible minimum coverage which states must provide." Rush v. Parham, 440 F.Supp. 383, 389 (N.D.Ga. 1977), adopted by HEW in Brief of the Secretary in Rush at 8.

Intervening-defendants mischaracterize HEW's position on the requirements of the

Social Security Act in this case and Zbaraz as a "change". Int-Def. Brief at 84, n.19. Rather, the consistent position of HEW, adopted when Title XIX was enacted in 1965 and consistently reiterated since then, has been that: "Limitations may not be set by eliminating certain groups of patients or certain diagnoses from coverage...." HEW Handbook of Public Assistance Administration, Supplement D, §D-5140, issued June 14, 1966.[46/]

[46/] When the regulation was initially codified from the Handbook in 1970, it required that medical and remedial care and services provided under Medicaid

> [m]ust be sufficient in amount, duration and scope to reasonably achieve their purpose. With respect to the required services...the state may not arbitrarily reduce amount, duration and scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition. Appropriate limits may be placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures. (Emphasis added.) 45 C.F.R. §249.10 (a)(5)(1970-79).

This regulation was recently recodified, in substantially similar form. It now provides:

> (a) The plan must specify the amount and duration of each service that it provides.

(footnote continued on next page)

As this Court noted in Beal v. Doe, 432 U.S. 438, 447 (1977), the Department of Health, Education and Welfare is "charged with the administration of this complicated statute," and "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." Here, as we have shown, the Secretary's reading of the legal requirements is firmly grounded in the statute, and has been consistently maintained.

This Court has long recognized that:

> So long as this regulation is extant it has the force of law.... So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States

---

(footnote continued from preceding page)

> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
> (c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
> (2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

42 C.F.R. §440.230 (1979).

> as the sovereign composed of three branches is bound to respect and enforce it. United States v. Nixon, 418 U.S. 683, 695 (1974); Lewis v. Martin, 397 U.S. 552 (1970).

Intervenors attempt to use the fact that the Secretary has approved Medicaid plans in states that limit abortion funding to life-threatening circumstances as proof of "...the freedom accorded the States...." Int-Def Brief at 84 n.19. This totally ignores the position of HEW that lack of federal funding suspends underlying obligations which resume once funding is resumed. U.S. Brief in Zbaraz at 19.

The principle that the Medicaid statute prohibits exclusions on the basis of diagnosis or condition is of essential importance to the fair and even-handed administration of this complex program to meet the medical needs of the poor.[47/] Successive

---

47/ For example, White v. Beal, 555 F.2d 1146 (3rd Cir. 1977), affirming 413 F.Supp. 1141 (E.D. Pa. 1976), struck down a Pennsylvania provision that allowed Medicaid payments for eyeglasses for people with eye pathology, but denied payments for people with refractive error. Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977), invalidated a drug formulary that made drugs inaccessible to patients with particular conditions. While many federal

(footnote continued on next page)

Secretaries, some of whom were profoundly opposed to abortion, have consistently retained the prohibition on diagnosticly-based exclusions in the face of congressional action withdrawing funds, on the basis of diagnosis and condition for a single medically necessary service, i.e. abortion. This simply confirms that the prohibition on diagnostic-based exclusions is of quintessential importance in the sensible administration of Medicaid.

Finally, intervening-defendants' discussion of the PSRO provisions (Int-Def. Brief at 77-84) is fundamentally flawed. The analysis at 81-85 of the Zbaraz Appellees' Brief makes a catalogue of intervenors' errors unnecessary. But a few related misconceptions merit emphasis. First, it is not the PSRO's, but individual physicians, who determine in

---

(footnote continued from preceding page)

courts have enforced the prohibition on diagnosticly-based exclusion, no federal court has ever approved a state effort to exclude Medicaid payments for a particular medical diagnosis or condition, except a Utah district court, in a Medicaid abortion decision that was subsequently reversed by the 10th Circuit. D.R. v. Mitchell, 456 F. Supp. 609 (D.Utah 1978) rev'd 78-1675 (10th Cir., March 10, 1980).

the individual case that the provision of particular services is medically necessary; their determinations are, of course, subject to PSRO review, in accord with the PSRO norms. See 42 U.S.C. §§1320c-4, 1320c-5, 1320c-9. Second, the unsupported suggestion (Int-Def. Brief at 81-83) that judgments made about the medical necessity of abortion are analytically different from other types of medical judgments, and therefore the state can assume responsibility for evaluating pregnancies, ignores the record in this case and in Zbaraz. Appellees' Brief at 26-60; Zbaraz Appellees' Brief at 13-20. Third, their argument wholly subverts the fundamental purpose of PSRO peer review, which is precisely to assure that physicians, not state officials, will make judgments about medical necessity under the Medicaid program. See Zbaraz Appellees' Brief at 81-82.

Bereft of support in the language of the Act, its legislative history, or HEW regulations, the intervenors fall back upon the argument that abortion is somehow "unique in a manner which permits special funding limits with regard to it." Int-Def. Brief at 94. (Initial capitalization in heading omitted). For that view, they rely principally upon the

illegality of abortions in most states in 1965, when the Medicaid program was established. Id. at 97-101. That reliance is misplaced. See Zbaraz Appellees' Brief at 93-96.[48/]

48/ Intervenors go on to argue that the subsequent legalization of abortion in all the states does not affect their analysis. To buttress this point, they hypothesize that a state decriminalizes marijuana and covers it under Medicaid (i.e., as a drug) to treat glaucoma. On this assumption, they then assert that our reading of the statute would require coverage of marijuana when recommended by a physician as "medically necessary" to "relax his nervous patients or cheer up his depressed ones." Int-Def. Brief at 102.

The analogy intervenors draw is faulty. Drugs are, of course, an optional service, and a state might entirely exclude them from coverage. If, however, a state elected to cover drugs, it would still not have to cover marijuana for treatment of a particular condition, e.g. glaucoma, absent both FDA approval and legalization in the state of marijuana as a drug for that explicit purpose. A state could not deny that drug to a glaucoma victim solely because that treatment was illegal in 1965. Whether or not the use of marijuana were medically necessary to treat glaucoma in a particular case, would be a determination of an individual's physician subject to PSRO peer review. Medicaid does not finance whiskey, even though it might cheer some people up; it doesn't fund food, even though food cures malnutrition. But the mandatory physician and hospital services necessary to treat women for the complications of pregnancy which have always fallen within the statutory ambit now include medically necessary abortion services. See Zbaraz Appellees' Brief at 94-96. Nor can a state restrict a provision under Medicaid because of the diagnosis, illness, or condition of the Medicaid recipients--whether that is glaucoma or health-endangering pregnancy. 42 C.F.R. §440.230 (1979).

CONCLUSION

For the reasons stated, the Hyde Amendments violate the First and Fifth Amendments, and the judgment of the lower court should be affirmed.

April, 1980

Respectfully submitted,

RHONDA COPELON
NANCY STEARNS
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

JANET BENSHOOF
JUDITH LEVIN
c/o American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SYLVIA A. LAW
New York University Law School
40 Washington Square South
New York, New York 10012
(212) 598-7642

Attorneys for Women and Doctor Plaintiffs-Appellees and the Women's Division of the Board of Global Ministries of the United Methodist Church

HARRIET F. PILPEL
Greenbaum, Wolff & Ernst
437 Madison Avenue
New York, New York 10022
(212) 758-4010

EVE W. PAUL
Planned Parenthood Federation of America
810 Seventh Avenue
New York, New York 10019
(212) 541-7800

Attorneys for Plaintiff-Appellee Planned Parenthood of New York City, Inc.

ELLEN K. SAWYER
Corporation Counsel of the City of New York
Municipal Building
New York, New York 10007
(212) 566-2665

Attorneys for Plaintiff-Appellee New York City Health and Hospitals Corp.

Of Counsel:

PATRICIA HENNESSEY
425 Park Avenue
New York, New York 10022
(212) 759-8400

ANNE R. TEICHER
36 Horatio Street
New York, New York 10014
(212) 691-2048

KATHLEEN WHELAN
35 Tanager Lane
Levittown, New York 11756
(516) 796-3238

Supreme Court, U.S.
FILED
APR 17 1980
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

Nos. 79-4, 79-5, 79-491, and 79-1268

In the Supreme Court of the United States

OCTOBER TERM, 1979

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, APPELLANTS

v.

DAVID ZBARAZ, ET AL.

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE FEDERAL APPELLANTS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-4

JASPER F. WILLIAMS AND EUGENE F. DIAMOND, APPELLANTS

v.

DAVID ZBARAZ, ET AL.

No. 79-5

JEFFREY C. MILLER, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID, APPELLANT

v.

DAVID ZBARAZ, ET AL.

No. 79-491

UNITED STATES OF AMERICA, APPELLANT

v.

DAVID ZBARAZ, ET AL.

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

CORA MCRAE, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT OF ILLINOIS AND THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE FEDERAL APPELLANTS

We respond briefly to two constitutional arguments advanced by appellees in *McRae* and to a statutory argument advanced by appellees in *Zbaraz* and apparently joined by appellees in *McRae* (see McRae Br. 112).

1. Appellees in *McRae* repeatedly state (McRae Br. 115, 123, 127, 128, 140-142) that the Hyde Amendment "imposes a substantial burden" on the exercise of a woman's right to terminate her pregnancy. They also accuse Congress of "affirmatively reaching out to destroy entitlement to essential medical services" (*id.* at 115, 127). By their lengthy discussion of these assertions in the opening portion of the argument section of their brief (*id.* at 113-136, 139-142), appellees may intend to present a constitutional theory different from the equal protection reasoning adopted by the district courts in both *McRae* and *Zbaraz*. Through their references to impermissible burdens and statutory entitlements, appellees may be asserting a due process argument that focuses, not on the distinction between abortion and other medically necessary services, but rather on the right to seek an abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). Appellees' position appears to be that, completely apart from whether Congress had a rational basis for treating abortion differently from other medical services, Congress had an independent obligation to provide funds for medically necessary abortions so as not to discourage exercise of the right recognized in *Roe* v. *Wade*. This argument is insubstantial.

Congress has not penalized women who wish to obtain abortions. Women who decide to terminate their pregnancies, whether for medical reasons or otherwise, do not suffer any disability as a result. The present case is thus substantially different from *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), on which appellees heavily rely. Here, Congress has not said that women who obtain abortions will be ineligible to receive medical care in the

future or will lose accumulated seniority rights or will be deprived of some other benefit to which they would otherwise be entitled. Congress has simply refused to pay for the exercise of a pregnant woman's constitutionally protected choice. For due process purposes, the situation is analogous to the government's failure to pay an indigent's interstate bus fares (*Maher* v. *Roe*, 432 U.S. 464, 474-475 n.8 (1977)) or to provide transportation to the polls on Election Day for voters who cannot get there on their own. The important distinction is that between refusal to subsidize a right's exercise and imposition of some present or future penalty as a consequence of a decision to exercise the right.[1] The former is permissible, and the Hyde Amendment is an example of legislation of that kind. The latter raises serious constitutional problems, but no such government action is at issue in this case.

This Court has explicitly observed that the concepts of "property" and "entitlement," developed in the context of procedural due process, "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). Accord, *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960). The Court has applied the same standard in reviewing social welfare legislation that withdraws a prior statutory entitlement as it has in reviewing social welfare legislation that extends a benefit to an arguably under-inclusive class. In either case, the only relevant constitutional inquiry is whether Congress had a rational

---

[1]To the extent appellees present a due process rather than an equal protection argument, they apparently contend that Congress would be required to fund medically necessary abortions even in the absence of the Medicaid program. This Court has never held that Congress must expend public funds in order to enable indigents to exercise their constitutional rights.

basis for drawing the lines it did. If the legislative classification is permissible, no independent due process problem is presented. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170 (1978); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

2. Appellees in *McRae* also contend (McRae Br. 142-150) that the Hyde Amendment is unconstitutionally vague. This argument, too, is without merit. In essence, appellees' submission is that doctors do not understand and cannot implement the Hyde Amendment. Appellees further assert that physicians fear prosecution for erroneous certifications that particular abortions satisfy the Hyde Amendment requirements. The answer is threefold.

In the first place, the vagueness doctrine only applies to punitive statutes. See *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 390-397 (1979). No version of the Hyde Amendment has ever contained a penalty provision. Moreover, the sanction provision in the Medicaid Act contains a clear scienter requirement. 42 U.S.C. 1396h. Only if a doctor "knowingly and willfully" makes fraudulent claims is he subject to prosecution or other sanctions. Good faith errors are not penalized. See *Colautti* v. *Franklin*, *supra*, 439 U.S. at 395.

Second, vagueness challenges are ordinarily adjudicated in response to particular factual situations that enable the reviewing court to assess the degree of difficulty encountered in applying the statutory language to a real set of circumstances. Here, although appellees offered testimony concerning various patients for whom physicians were purportedly unwilling to issue a Hyde Amendment certification, there is no evidence that either the physicians or their patients tried to ascertain at the time a Medicaid abortion was sought whether federal or

local administrators of the program would have regarded the procedure as one covered by the language of the Hyde Amendment. Appellees have not offered any evidence concerning the attempted imposition of sanctions for a physician's improper application of the Hyde Amendment standards, and their vagueness argument is therefore premature.

Third, even if the Hyde Amendment were a punitive statute subject to challenge under the vagueness doctrine, it would pass constitutional scrutiny. A statute is not unconstitutionally vague unless " 'men of common intelligence must necessarily guess at its meaning.' " *Broadrick* v. *Oklahoma*, 413 U.S. 601, 607 (1973). This Court has recognized (*id.* at 608) that

> "[t]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Physicians routinely assess the varying degrees of risk faced by their patients or posed by alternative methods of treatment. They can certainly make a good faith determination of whether "the life of the mother would be endangered if the fetus were carried to term."

3. Appellees in *Zbaraz* argue vigorously (Zbaraz Br. 99-130) that the Hyde Amendment does not relieve states participating in the Medicaid program of the preexisting obligation to fund all medically necessary abortions.[2]

---

[2]The question of which authority makes the final determination of whether a particular service is medically necessary has not been litigated in these cases and is not currently before the Court.

Accordingly, appellees urge this Court to affirm the judgment of the Illinois district court on statutory grounds, without reaching the constitutional issues.

As we have explained in our opening brief (No. 79-491 Br. 45-49), appellees' statutory argument is faulty because there is no evidence whatever that the Congresses that have enacted the various versions of the Hyde Amendment expected the statute to have the effect of requiring states to provide 100% funding for all medically necessary abortions as a precondition to participation in the Medicaid program. Appellees have collected a great many statements by legislators to the effect that the Hyde Amendment restricts the use of federal funds for abortions (Zbaraz Br. 109-112 & n.*), but that is a tautology. The significant question, which appellees do not adequately address, is what effect the Hyde Amendment's funding restrictions have on state obligations under the Medicaid Act. Despite appellees' best efforts (Zbaraz Br. 123-128), they have been unable to identify any medical service that states must cover as a condition of participation in the Medicaid program and for which the federal government will provide no reimbursement.[3] This is hardly surprising in light of the

[3]Appellees' purported examples of situations in which states must bear the full expense of Medicaid coverage for a particular group of beneficiaries are all readily distinguishable from the present situation. In no case cited by appellees has the federal government refused to fund a particular form of treatment and nevertheless insisted that the states continue to fund that form of treatment. In virtually every instance cited by appellees, the states' obligation to provide funding to a particular group of beneficiaries without federal assistance is a consequence of some other fiscal policy decision made by the state and readily reversible by the state if and when additional federal contribution is desired. Here, by contrast, appellees would leave the states no choice but to withdraw from the Medicaid program or to provide full funding of all medically necessary abortions not covered by the Hyde Amendment. Congress intended no such result.

Medicaid program's fundamental characteristic: cooperative federal-state funding. Neither in 1965, when the Medicaid Act was passed, nor in the years since, during which the Act was amended several times and the Hyde Amendment restrictions were added to HEW appropriations legislation, has Congress suggested that the states must bear the full financial burden of a particular category of medical services as a precondition to the receipt of any federal Medicaid funds.

Appellees in *Zbaraz* rely heavily (Zbaraz Br. 122-123) on the Secretary of HEW's opposition to the 1977 Application for a Stay in *McRae*, but that document does not take the position that appellees attribute to it. The point of the Secretary's filing was not that the Medicaid Act *obligates* participating states to fund services for which federal contribution is not available, but that the Act *does not prohibit* participating states from funding as many medical services as they choose, even if the federal government refuses to finance one or more such services. This interpretation was correct in 1977, and it remains correct today. The corollary is equally true, and it is dispositive of the validity of the Illinois statute at issue in *Zbaraz*. Just as the Medicaid Act does not *prohibit* states from funding services not covered by federal contribution, so it does not *require* them to do so.

For these reasons and the reasons stated in the opening briefs of the federal appellants, the judgments of the district courts should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04

FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1268

In the Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,

Appellant,

vs.

CORA McRAE, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSE A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

GERALD E. BODELL
102 E. 35th Street
New York, NY 10016

VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
ROBERT A. DESTRO
Americans United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, Il 60601
312/263-5386

Attorneys for James L. Buckley, Jesse A. Helms, Henry J. Hyde and Isabella M. Pernicone

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Table of Authorities ii

Argument 1

Introduction 1

I. Whether an Abortion Is Therapeutic Is Not Inherently a Medical Decision, But Rather a Societal or Individual Decision 2

II. Substantive Due Process Analysis Does Not Warrant Striking the Hyde Amendment 5

III. The Principles of Procedural Due Process Analysis Cannot Be Transmuted to Create Any "Right" to Public Funding of All "Medically Necessary" Abortions 8

IV. The Hyde Amendment Is Not Unconstitutionally Vague 12

V. The Hyde Amendment Does Not Establish Religion 18

Conclusion 20

TABLE OF AUTHORITIES

Cases

	PAGE
Arnett v. Kennedy, 416 U.S. 134 (1974)	10
Beal v. Doe, 432 U.S. 438 (1977)	19
Board of Regents v. Roth, 408 U.S. 564 (1972)	7, 10, 11
Branti v. Finkel, 48 U.S.L.W. 4331 (March 31, 1980)	11
Colautti v. Franklin, 439 U.S. 379 (1979)	14, 19
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)	18
Goldberg v. Kelly, 397 U.S. 254 (1970)	10
Maher v. Roe, 432 U.S. 472 (1977)	7, 9, 11, 19
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	5
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1975)	19
Relf v. Weinberger, 372 F.Supp. 1196 (D.D.C. 1974)	15
Richardson v. Belcher, 404 U.S. 78 (1971)	12
Roe v. Norton, 408 F.Supp. 660 (D.Conn. 1975)	9
Roe v. Wade, 410 U.S. 113 (1973)	7, 19
Smith v. Organization of Foster Families, 431 U.S. 816 (1977)	12
United States v. Vuitch, 402 U.S. 62 (1971)	14
Vitek v. Jones, 48 U.S.L.W. 4317 (March 25, 1980)	10
Zablocki v. Redhail, 434 U.S. 374 (1978)	5, 6

Miscellaneous

	PAGE
42 U.S.C. §1396h(a) (1976)	13, 14
Devereux, A Typological Study of Abortion in 350 Primitive, Ancient, and Pre-Industrial Societies, in Therapeutic Abortion (H. Rosen ed. 1954)	3
Hohfield, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.F. 16 (1913)	6
U.S. Const. Art. I	4

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,

Appellant.

vs.

CORA McRAE, et al.,

Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

REPLY BRIEF OF INTERVENING DEFENDANTS-APPELLEES JAMES L. BUCKLEY, JESSE A. HELMS, HENRY J. HYDE, AND ISABELLA PERNICONE IN SUPPORT OF APPELLANT HARRIS

ARGUMENT

Introduction

Intervening Defendants-Appellees ("Intervenors") have, for the most part, anticipated and adequately answered the arguments of Plaintiffs-Appellees ("Plaintiffs") in support of the district court decision. A limited reply is appropriate, however, to the extent that Plaintiffs

place heavy reliance on their claim under the Establishment Clause of the First Amendment and on an asserted "statutory entitlement" which they contend somehow brings into being a substantive, as opposed to a procedural, due process claim. A reply is also appropriate to their claim that the Hyde Amendment is unconstitutionally vague.

Throughout their brief, Plaintiffs emphasize what they perceive to be the unfairness and even cruelty of the Hyde Amendment. Seemingly, they appeal to what they hope to be this Court's sense of "equity." This emphasis, together with the failure of their brief to articulate any coherent theory showing violations of established constitutional rights, vindicates the central argument of the Intervenors: to affirm the decision of the lower court would be to transform policy argument into constitutional dogma, and to give to the judiciary the function of the legislature.

I.
WHETHER AN ABORTION IS THERAPEUTIC IS NOT INHERENTLY A MEDICAL DECISION, BUT RATHER A SOCIETAL OR INDIVIDUAL DECISION

After a study of 350 different societies, the noted anthropologist George Devereux concluded:

> Every pregnancy, however normal it may be and however joyfully it may have been planned and anticipated, involves certain physiological, psychological and social readjustments which, in the broadest sense, represent "stress." . . . Insofar as an abortion is allegedly undertaken for the purpose of alleviating or forestalling some situation of stress, it may be described, in theory, at least, as "therapeutically indicated. . . ." [W]hen the woman herself, or someone else, decides that an abortion should take place, this implies that the abortion is *subjectively* viewed as

> "therapeutically indicated," since its assumed nominal purpose is to alleviate or forestall one kind of "stress." Sometimes, this definition of the situation is in harmony with prevailing social codes and value systems. In other cases, the individual's decision is made in terms of a subjective system of values which is sharply at variance with more generally accepted social codes or value systems. In other words, what the individual deems to represent "therapeutic indications" for abortion, . . . may . . . not satisfy social criteria for what constitutes a "good and sufficient" —*i.e.*, "socially legitimate"—"therapeutic indication" for abortion. In brief . . . , social criteria, based upon existing systems of values, determine what *kinds* and *degrees* of stress are accepted as constituting a . . . "therapeutic indication" for abortion.

G. Devereux, *A Typological Study of Abortion in 350 Primitive, Ancient, and Pre-Industrial Societies*, in Therapeutic Abortion 97 (H. Rosen ed. 1954) (emphasis in original).

Plaintiffs do not shrink from openly citing the broadest possible examples of indications for what they call "medically necessary" abortions. For example, they maintain, "For . . . teenagers . . . an unwanted pregnancy, if not terminated, may be the factor which transforms a precarious and difficult life into one with which they are unable to cope either physically or mentally." Brief of Appellees at 50. *See also id.* at 39-40, 41, 43, 44-45. *Cf.* Brief of Intervening Defendants-Appellees at 15-18.

Yet they wish to insist that these factors are consigned to the exclusive discretion of physicians, as though the value judgment of what sorts or kinds of stress create a "therapeutic" indication were one over which the medical profession exercises exclusive jurisdiction. The district

court went so far as to say that, when an abortion is determined by a physician to be "medically necessary," any alternative to abortion is not medically "*possible.*" Slip op. at 311) (emphasis added). Plaintiffs, and the court below, thus consider that the Congress and our society is irreversibly bound by the value judgments of abortion-performing physicians. The record is clear that these physicians are perfectly willing to characterize *any* level of undesired stress as creating a "medical necessity" for an abortion. Brief of Intervening Defendants-Appellees at 16.

As Devereux's study indicates, however, this assumption that medical professionals, rather than the society at large, determine what is and what is not a "therapeutic" indication for an abortion is not soundly based. Rather, at least for the purpose of determining how taxpayers' money is to be spent, the Congress, as the body most representative of our "society," should be seen as the proper organ to set the limits on what constitutes "therapeutic" abortion. *See* U.S. Const., art. I.

What the Plaintiffs urge upon this Court is, in effect, the proposition that whether particular abortions are paid for with public funds should be decided by the subjective decisions of individual women and their concurring physicians that such abortions are "therapeutically indicated," and thus "medically necessary." In practice, under Plaintiffs' theory the definition of whether an abortion is therapeutic must be left to the subjective will of the individual seeking the abortion. But this determination, embodying as it inherently does a balancing of values in accord with cultural mores, must be left to the democratically responsive branch of government, the legislature.

II.

SUBSTANTIVE DUE PROCESS ANALYSIS DOES NOT WARRANT STRIKING THE HYDE AMENDMENT

Plaintiffs argue that substantive due process analysis would allow this Court to invalidate the Hyde Amendment by finding that among the substantive liberties protected by the Due Process Clause is a "constitutional protection of life and liberty [which] shields the individual from arbitrary governmental action demanding sacrifice of life or health" and that the Hyde Amendment unconstitutionally infringes on this liberty by failing to meet "minimal constitutional standards of fundamental fairness." Brief of Appellees at 140.

But the standard for substantive due process analysis is not whether this Court considers a particular piece of legislation to be "fair." In the words of Mr. Justice Stewart, dissenting in *Moore* v. *City of East Cleveland,* 431 U.S. 494, 539 (1977), "[W]e are [not] to use our power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces." Instead, as Justice Stewart has suggested, the "proper concerns" of such analysis are:

> [T]he nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen. Williams v. Illinois, [399 U.S. 235,] 260 (Harlan, J., concurring in result).

Zablocki v. *Redhail,* 434 U.S. 374, 396 (1978) (Stewart, J., concurring in the judgment).

The crucial aspect here is the "nature of the individual interest affected." Even if Plaintiffs are correct that governmental action "demanding sacrifice of . . . health" could infringe on substantive due process rights, this is not the sort of governmental action at issue in this case. Even assuming that the government, except in compelling circumstances, cannot constitutionally cause harm to one's health, this does not mean the government violates substantive due process when it fails to pay for the *treatment* of one's health. Even if the government cannot arbitrarily take away one's health, it has no obligation to give health to one who does not have it. The right to be free from state interference does not include a right to compel the State to interfere on one's behalf. *See* Brief of Intervening Defendants-Appellees at 7 *et seq.*

In *Zablocki* v. *Redhail,* 434 U.S. at 392, 392 n.1, Mr. Justice Stewart drew on the classic formulations of Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 Yale L.F. 16 (1913). Hohfeld's terminology is also illuminating in this context: the right to privacy which encompasses the termination of pregnancy is more accurately termed an "immunity" than a "right." "A right is one's affirmative claim against another . . . whereas an immunity is one's freedom from the legal power or 'control' of another." *Id.* at 55. A "right" (which Hohfeld considers the synonym of a "claim," *id.* at 32) creates a correlative "duty" for the other against whom one has the "right." On the other hand, an "immunity" creates only a correlative "disability" for the other from whose interference one is immune. In this context, "disability" means that the State has no "power" to trespass in the zones of immunity by interfering with a woman's private decision to have an abortion. But this "immunity" does not give the woman a "claim" on the State for assistance in having the abortion. The "right to privacy" is an immunity from state interference, not a claim-right to state aid.

Of course, in refering to "the individual interest affected," neither Mr. Justice Harlan nor Mr. Justice Stewart could have meant the mere subjective interest of an individual in the sense of any desire or need that individual may have, however weighty or important the desire or need may appear. Instead, "We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents* v. *Roth,* 408 U.S. 564, 571 (1972) (*per* Stewart, J.). Any other understanding would vest every want with constitutional significance.

Justice Stewart, in his concurring opinion in *Roe,* has suggested that the basis of the Court's holding in that case is a substantive due process right of the pregnant woman. *Roe* v. *Wade,* 410 U.S. at 169. But what is the nature of this substantive due process right? *Maher* is conclusive: "*Roe* did not declare an unqualified 'constitutional right to an abortion. . . .' Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe,* 432 U.S. 472, 473-474 (1977). *See* Brief of Intervening Defendants-Appellees at 33-37. This description of the interest at stake is no less applicable to a substantive due process analysis than to an equal protection analysis. By definition, it is an interest which is not infringed here.

The other aspects of Justice Stewart's substantive due process test are also met. The choice not to pay for the destruction of subjects' of legitimate state interest certainly is rationally connected to the legitimate interest in those subjects. In the context of government funding, it is hard to envisage an "alternative means for effectuating the purpose" of preserving fetal life to that chosen here:

reimbursing the costs of pregnancy, treatment of pregnancy complications and childbirth, while refraining from paying for abortion. Finally, the extensive legislative debates conclusively document that "the statute reflects the legislative concern" for fetal life, which "legitimately support[s] the means chosen."

Thus, the legislative choice to refuse to fund abortion does not impinge on the substantive due process "right" to privacy.

III.

THE PRINCIPLES OF PROCEDURAL DUE PROCESS ANALYSIS CANNOT BE TRANSMUTED TO CREATE ANY "RIGHT" TO PUBLIC FUNDING OF ALL "MEDICALLY NECESSARY" ABORTIONS

Proceeding upon the assumption that the "Social Security Act . . . requires that Medicaid programs pay for all medically necessary services," Plaintiffs contend that through the Hyde Amendment "Congress affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled." Brief of Appellees at 115. This, they say, distinguishes it from the situation faced in *Maher* where they claim the State "simply did not extend the scope of Medicaid to include payment for elective services." *Id.* They then attach constitutional significance to a difference between "merely failing to extend a benefit not otherwise available" and "affirmatively reaching out to destroy entitlement to essential medical services." *Id.* Conceding there is no "abstract . . . right to funded abortions," *id.*, Plaintiffs apparently assert that if the legislature once enacts an entitlement to funded abortions, it thereby creates a constitutional right to funded abortions which precludes the legislature from simultaneously or thereafter limiting the entitlement which it has itself created. Plaintiffs' analysis is faulty for several reasons.

First, this argument—though couched in due process terms such as "entitlement"—is no more than an equal protection argument that the State cannot fund other medical services without also funding abortions. This equal protection argument, as demonstrated in the Brief of Intervening Defendants-Appellees at 54-69, was resolved by this Court against Plaintiffs in *Maher*.

Second, assuming that their argument is in fact a due process argument, the attempt of the Plaintiffs to distinguish this case from *Maher* is unsupported by the facts. Plaintiffs apparently assume that only "medically necessary" procedures were funded under the Connecticut regulatory scheme, and that therefore the failure to fund medically *un*necessary abortions was consistent with that scheme. Plaintiffs' understanding of the Connecticut medical welfare scheme, however, is incorrect. Under the Connecticut policy, *all* expenses related to pregnancy and childbirth were funded, without any requirement that they be certified as "medically necessary." *Maher,* 432 U.S. at 468; *Roe* v. *Norton,* 408 F. Supp. 660, 663 (D. Conn. 1975), *rev'd on other grounds sub nom. Maher* v. *Roe.* Indeed, were this not the case, the lengthy equal protection analysis of *Maher* would have been inappropriate: if medically *un*necessary treatment for pregnancy were a "benefit not otherwise available" under the Connecticut plan, there would have been no occasion to consider whether abortions which were not certified to be "medically necessary" could or could not be excluded under the Equal Protection Clause.

Of course, *Maher* upheld the Connecticut regulation which, expressed in the terms of Plaintiffs' argument here, "affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled."

Third, Plaintiffs mistake the nature of "entitlement." It is true that a statute establishing a governmental wel-

fare program can create a "property interest" for an individual who under the conditions set forth in the statute is eligible for a benefit therein described. Such an individual may not be deprived of that property (*e.g.*, by being declared ineligible) without due process of law. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In this sense, there is no constitutional distinction among entitlements, privileges, and rights. *Board of Regents* v. *Roth*, 408 U.S. 564, 571 n.9 (1972). It is also true that when a statute creates such an interest, although the "dimensions of the interest are defined" by the statute, *id.* at 577, the statute may not establish procedures by which one may be deprived of the interest that fall below constitutionally required levels. *Vitek* v. *Jones*, 48 U.S.L.W. 4317, 4320 (March 25, 1980).

But there is a crucial distinction between statutory provisions which affect the procedures under which a property entitlement, once created, can be taken away and statutory provisions which demark the substantive nature of the property entitlement initially created. The distinction is one between "the nature of one's property interest" and "the extent of the procedural protection to which he may lay claim." *Arnett* v. *Kennedy*, 416 U.S. 134, 166 (1974) (Powell, J., concurring), adopted by a majority of the Court, *Vitek* v. *Jones*, 48 U.S.L.W. at 4320 n. 6.

There is a crucial distinction between, on the one hand, statutory provisions or administrative practices which relate individuals to a system of structured benefits and affect those individuals' access to the benefits and, on the other hand, statutory provisions or administrative decisions which deal with the general scope of coverage or nature of such benefits. The latter confer property; the former determine whether or not particular individuals are eligible within the bounds of what is conferred. "It is a purpose of the ancient constitution of property to

protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity to vindicate claims." *Board of Regents* v. *Roth*, 408 U.S. at 577. Here, we deal with what creates a justifiable reliance, not with whether there is an opportunity to vindicate claims.

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.

Id. at 577.*

* This Court's recent holding in *Branti* v. *Finkel*, 48 U.S.L.W. 4331, 4332 n.6 (March 31, 1980), that "the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs" is not to the contrary. There is a distinction between dismissal based solely on private political beliefs which, the Court held, has no basis in legitimate state interest, and a decision not to provide funding on the basis of the legitimate and strong interest in the fetus. Even when no fundamental right is impinged a statutory distinction must pass muster under the rational relationship test. *Maher* v. *Roe*, 432 U.S. at 478. The question here is whether there somehow exists an entitlement in this case, not present in *Maher*, which invokes strict scrutiny by invoking a fundamental right. For this purpose, the lack of a "reasonable expectation" confirms the nonexistence of an entitlement, and hence preserves the applicability of the lower level of scrutiny.

If this distinction is ignored, it will deprive the legislatures of that flexibility and power to experiment which is crucial to the governance of a changing society. It will eliminate democratic responsiveness. And it will not advance the needs of the poor, since Congress is likely to be greatly deterred from enacting any further social welfare programs if it knows it can not thereafter reduce or alter the benefits to be provided under them.

Like the foster parent-child relationship dealt with in *Smith* v. *Organization of Foster Families,* 431 U.S. 816, 856 (1977) (Stewart, J., concurring), the Medicaid system "is, of course, wholly a creation of the State." Just as "New York law provides no basis for a justifiable expectation on the part of foster families that their relationship will continue indefinitely," *id.* at 860, federal law provides no basis for a justifiable expectation on the part of welfare recipients that the government will indefinitely fund all forms of medical treatment, never limiting or altering the scope of coverage.

This Court has never held that creating a general entitlement with an exception somehow triggers a property interest in the subject matter of the exception. The Court has specifically affirmed the authority of the legislature to alter a statute which, had it not been altered, would provide an entitlement. *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971).

IV.

THE HYDE AMENDMENT IS NOT UNCONSTITUTIONALLY VAGUE

Although it is not clear that the district court held the Hyde Amendment unconstitutional on vagueness grounds (*see* slip op. at 322-323), Plaintiffs nevertheless argue that the lower court's decision should be sustained based on

the alleged "strangeness to medical thinking of the [Hyde Amendment's] 'life-endangerment' " standard coupled with a "realistic threat" of prosecution for medicaid fraud. Brief of Appellees at 143.

Plaintiffs argue that the existence of federal criminal sanctions for medicaid fraud and abuse place the physicians under a constant threat of criminal prosecution for mistaken conclusions that abortions are necessary because continued pregnancy poses a danger to maternal life. This supposed threat exists because reimbursement certifications filed by physicians seeking compensation for performing an abortion might be subject to administrative review. Plaintiffs fear that such a review might conclude that the physician's certification was an unwarrantedly broad interpretation of the Hyde Amendment restriction, and further fear that on this basis a criminal prosecution could be initiated against the physician under 42 U.S.C. § 1396h(a) (1976). Plaintiff's apprehensions follow their misunderstanding of § 1396h(a) which, they claim, provides that "a false statement by a physician or a recipient in an application for payment is a felony, punishable by imprisonment up to five years, or a fine of up to $25,000, or both, even if the medicaid payment is never made." Brief of Appellees at 145 n. 173.

It is certainly *not* the case that physicians can be subjected to prosecution under the federal medicaid fraud statute for making a mistaken certification that an abortion is reimbursible under the Hyde standard. The statute actually states as follows:

> Whoever—
>
> (1) *knowingly and willfully* makes or causes to be made any false statement or representation of a material fact in any application for any benefit or pay-

ment under a State plan approved under this subchapter,

(2) at any time *knowingly and willfully* makes or causes to be made any false statement or representation of a material fact for use in determining right to such benefit or payment, . . .

. . .

shall (i) in the case of such statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both,

. . . .

42 U.S.C.A. § 1396h(a) (1976) (emphasis added).

The physician may only be prosecuted for "knowing" and "willful" misrepresentations—the government must prove that the physician lied, intended to lie, and knew he was lying before it may successfully prosecute him for medicaid fraud. The existence of not only intent but also scienter requirements insulates the physician against criminal prosecution for mistaken judgments in the manner this Court has contemplated. *See Colautti* v. *Franklin,* 439 U.S. 379, 394-397 (1979). Significantly, the knowing and willful misrepresentations must be of "material facts," suggesting that mere medical conclusions, even if erroneous, do not fall within the scope of the statute. Moreover, the United States has specifically stated that it will not prosecute physicians for fraud where a physician's judgment has been made in *subjective* good faith. Slip op. at 97. *See United States* v. *Vuitch,* 402 U.S. 62 (1971). It simply does not follow, therefore, that the physician can claim any "realistic threat" of criminal prosecution for mere mistaken judgments under the Hyde Amendment coupled with the fraud provisions of the Medicaid Title.

The remedy would have been worse than the cure if specific categories of maladies had been enumerated for which the physician might be reimbursed under the Amendment. Such categories could have been subjected to the same "vagueness" attack that the Plaintiffs level here; physician discretion would have been lost; certain categories might have been improperly excluded and others improperly included; advances in medical knowledge and technology could not have been so easily taken into account.*

Finally, the Plaintiffs' claim that the district court's finding that the Hyde Amendment standard is so alien to medical practice that it is unintelligible to the physician is simply not supported by the record. Time and time again the Plaintiffs' witnesses answered inquiries in a manner which demonstrated that they understood the meaning of the term, even in the face of their alleged confusion. *See, e.g.,* Hodgson, T. at 102, 107, 108; Eliot, T. at 389, 390, 391, 392, 393, 394, 397, 398, 416 (1-3% of all pregnancies), 418 (a "very low percentage . . . . [Modern medicine] can carry to term almost any pregnancy"), 440, 446; Bingham, T. at 493 (.1% of pregnancies). As the dis-

---

* No provision in a government grant-in-aid program has ever been held *unconstitutionally* vague, and if the Amendment were to be so stricken there is no doubt that most of the entire Medicaid Title could be subjected to attack in the manner the Plaintiffs suggest here.

It is the administrative duty of HEW to issue regulations to carry forth the intent of the Amendment. Even if, as the Plaintiffs argue, the actual effect of the Amendment were inconsistent with its legislative intent (Brief of Appellees at 143), the proper remedy would then be to order HEW to issue clarifying regulations, not to strike the Amendment as unconstitutionally vague. *See, e.g., Relf* v. *Weinberger,* 372 F. Supp. 1196 (D.D.C. 1974).

trict court judge himself commented during the course of the trial,

> Now I feel it is possible to inject uncertainly into this language, it can be done, but to say soberly that doctors don't know within the limits of professional error when they believe that a woman's life will be endangered by carrying the fetus to full term, that seems to me is a statement that none of us laymen can tolerate.
>
> We go to doctors for just these things.

T. at 293.

To claim that the term "life endangerment" is vague merely because it is "strange" to medical usage begs the question. "Insanity" is not a medical term either and, as such, is foreign to medical practice. But it is not unconstitutional to require physicians to employ non-medical terms—either "insanity" or "life endangerment"—in order to asses the legal significance of conduct or treatment.

In any case, the record establishes that the standard which the Plaintiffs claim should replace the Hyde criterion—"medical necessity"—is *less* intelligible than the "life endangering" standard. Those who testified on this matter may have claimed they understood the meaning of "medical necessity," but they certainly understood it to mean different things. Hodgson, T. at 52 ("Hundreds of indications [are] . . . considered medical indications for abortion . . . . There would be no total agreement in any group of physicians on the necessary medical indication . . . .").

> In my medical judgment every pregnancy that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.

> In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%. . . . I think they are all medically necessary. . . . Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary because I am considering the woman's physical, mental, emotional and social and welfare and family and environment and all that. . . . I am concerned with the quality of life not physical existence.

Hodgson, T. at 99-101.

See also Eliot, T. at 428 ("half of all women . . . [have] problems connected with their pregnancies . . . [so] that I would classify [abortions] as medically necessary"); Hoffman, T. at 1342 ("I consider all abortions medically necessary in adolescents . . . ."); Sloan, T. at 1741 (abortion is never medically indicated for a "wanted" pregnancy). As Plaintiffs' witness Dr. Christopher Tietze testified:

> Q. [D]o you have an opinion on whether the medical necessity standard can be applied uniformly?
> A. Yes, I do have that opinion.
> Q. Can you tell us what it is?
> A. That it cannot.

Tietze, T. at 1003.

Thus, the "vagueness problem" perceived by Plaintiffs would not be alleviated by adopting Plaintiffs' proposed "medically indicated" or "medical necessity" standard. Does "medically necessary" suggest that a given treatment is the necessary condition precedent to obtaining health, thereby rendering an abortion medically necessary only when alternative means of treatment are not available? Or does it simply suggest a means to *improve* health? Or is it a "preventive medicine" standard? The medicaid fraud statute would apply to the "medically necessary" standard and would create the same problems for the physi-

cian which the Plaintiffs allege to arise from "life endangerment."

The fact that the "medical necessity" standard which Plaintiffs urge this Court to adopt does not resolve the problem of vagueness which Plaintiffs claim exists suggests that Plaintiffs do not like the more restrictive funding standard, rather than that they are sincerely confused over the meaning of life endangerment.

It must be concluded that the Plaintiffs' claim that the Hyde Amendment is unconstitutionally vague is unsupported by law or by fact.

V.

THE HYDE AMENDMENT DOES NOT ESTABLISH RELIGION

Although the district court rejected the Plaintiffs' claim that the Hyde Amendment represents an Establishment of Religion (slip op. at 323-326), the Plaintiffs argue that, as an alternative ground for affirming the lower court, this Court should find that the Amendment so contravenes the First Amendment.

For a law to be held unconstitutional under the Establishment Clause, it must have no clear secular purpose, its primary effect must be to advance or to inhibit religion, or it must involve excessive entanglement of government with religion. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773 (1973). None of these defects can be found in the Hyde Amendment.

Plaintiffs claim that this case presents the "threshhold question of whether legislation that promotes the belief that the human fetus is a human life is impermissibly religious." Brief of Appellees at 169. They argue that legislation enacted to protect the fetus—at least if enacted because the fetus is perceived to be "actual" human life, as opposed to "potential" human life—cannot serve a "secular purpose." Brief of Appellees at 170-171, 170 n.191.

Such an argument necessarily involves the claim that the State has no legitimate interest in the fetus. To accept such a proposition, this Court must overrule *Roe* v. *Wade* and every subsequent abortion related decision of this Court, all of which have held that the State maintains a direct and legitimate interest in the fetus. *Roe* v. *Wade,* 410 U.S. 113, 162 (1973). *See also Colautti* v. *Franklin,* 439 U.S. 379, 386-87 (1979); *Maher* v. *Roe,* 432 U.S. 464, 472, 478, 478 n.11 (1977); *Beal* v. *Doe,* 432 U.S. 438, 446 (1977); *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 61 (1975). The primary effect of the Hyde Amendment is to protect this important and legitimate interest. The legitimacy of the State's interest in potential human life does not vanish because some or even a majority of the Members of Congress believe that the fetus is actual human life.

Under the legislative scheme of the Hyde Amendment, there is no administrative involvement by the State with religious institutions; thus, there is no entanglement of the one with the other.

Plaintiffs' argument that the Hyde Amendment is unconstitutional because it results in political divisiveness along religious lines is naive. Striking the Hyde Amendment would cause greater divisiveness. It hardly serves the interests of religious comity to force the members of religions whose members believe that abortion is tantamount to homicide to finance effectuation of abortion decisions sanctioned by pro-abortion religions. To avoid entanglement in a purportedly "divisive" religious issue, the government should withdraw from the area of contention—as the Hyde Amendment withholds governmental

support for abortion decisions—rather than enter the fray in support of those religious which favor unrestricted abortions.

CONCLUSION

Neither the Plaintiffs' brief nor the district court opinion produces constitutional, as opposed to policy, reasons for overturning the legislative enactment of the Hyde Amendment.

The district court ruling must be reversed.

Respectfully submitted,

JAMES L. BUCKLEY
JESSE A. HELMS
HENRY J. HYDE
ISABELLA M. PERNICONE
Intervening Defendants-Appellants
By:
VICTOR G. ROSENBLUM
DENNIS J. HORAN
JOHN D. GORBY
CARL ANDERSON
PATRICK A. TRUEMAN
THOMAS J. MARZEN
ROBERT A. DESTRO
American United for Life
Legal Defense Fund
230 N. Michigan Ave. #515
Chicago, IL 60601
312/263-5386

GERALD E. BODELL
102 E. 35th St.
New York, NY 10016

A. LAWRENCE WASHBURN, JR.
1414 Avenue of the Americas
New York, NY 10019

April 10, 1980.

Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,
Appellant,

—v.—

CORA MCRAE, *et al.*,
Appellees.

PATRICIA R. HARRIS, Secretary of Health, Education and Welfare,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

BRIEF AMICI CURIAE of the The Association of Legal Aid Attorneys of the City of New York—District 65—U.A.W.; Baltimore Abortion Right; The Comision Femenil Mexicana Nacional; The Committee for Abortion Rights and Against Sterilization Abuse; The Committee to End Sterilization Abuse; District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO; Education for Freedom of Choice in Ohio; Grand Jury Project; La Raza Legal Alliance; The National Bar Association; The National Conference of Black Lawyers; The National Emergency Civil Liberties Committee; The National Lawyers Guild; The National Organization of Legal Services Workers; The National Women's Health Network; The Reproductive Rights National Network; Rochester Women Against Violence Against Women; Social Services Employees Union, Local 371, District Council 37, A.F.S.C.M.E., AFL-CIO; The United Electrical, Radio and Machine Workers of America; The Women's Justice Center

BARBARA ELLEN HANDSCHU
JANE BARRETT
MARILYNE MASON
DEBORAH WEIMER

NATIONAL LAWYERS GUILD
853 Broadway
New York, New York 10003

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES. i

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 15

ARGUMENT 20

INTRODUCTORY STATEMENT. 20

I. HISTORICAL EVIDENCE DOCUMENTS STERILIZATION ABUSE AMONG POOR AND MINORITY WOMEN. . . . 22

A. Sterilization Abuse Defined . 22

B. Prior to the Legalization of Abortion, Doctors Conditioned Abortion on a Woman's Agreement to Concurrent Sterilization. 27

C. Sterilization Abuse has had a Disproportionate Impact upon Poor and Minority Women . . . 29

D. The Sterilization of Poor and Minority Women for Medical Training Adds to the Probability of Sterilization Abuse . 41

II. WOMEN CANNOT VOLUNTARILY CONSENT TO STERILIZATION WHEN VIABLE OPTIONS ARE PRECLUDED OR CONSENT IS COERCED 45

A. Sterilization Abuse Results From the Implementation of the Hyde Amendment Restrictions on Abortion Funding 45

B. Sterilization Abuse Results from Uneven Enforcement of Inadequate Monitoring of the Department of Health, Education and Welfare Guidelines 49

III. DENYING FUNDING FOR MEDICALLY NECESSARY ABORTIONS WHILE PROVIDING FUNDING FOR STERILIZATION FORCES POOR AND MINORITY WOMEN TO BE STERILIZED IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS TO PRIVACY AND EQUAL PROTECTION 53

A. Implementation of the Hyde Amendment Results in a Funding Disparity Which Undermines the Purposes of the Social Security Act 53

B. Under the Hyde Amendment, the Medical Provisions of the Social Security Act Become, in Effect, a Sterilization Law Which Invidiously Discrminates Against Poor and Minority Women 56

C. The Disparity in Funding Results in an Impermissible Burden on a Woman's Right to Privacy, Which Includes the Right to Be Free From Involuntary Sterilization .57

D. No Compelling State Interest Justifies the Disparate Funding of Abortion and Steriliza-tion 60

TABLE OF AUTHORITIES

CASES:	Page
Beal v. Doe, 432 U.S. 438 (1977)	57
Christman v. American Cyanamid Co., No. 80-0024-P (N.D.W.Va.) (filed January 29, 1980)	27
Doe v. Bolton, 410 U.S. 179 (1973)	58
Eisenstadt v. Baird, 405 U.S. 438 (1972)	58
Hathaway v. Worcester City Hospital, 475 F.2d 701 (1st Cir. 1973)	59
Johnson v. City of New York, No. 10784/77 (Sup. Ct. N.Y., Kings Co.) (filed 1977)	32
Madrigal v. Quilligan, No. 75-2057 (C.D.Cal. 1978)	30
Maher v. Roe, 432 U.S. 476 (1977)	60
Relf v. Mathews, 403 F.Supp. 1235 (D.D.C. 1975)	22,51
Relf v. Weinberger, 372 F.Supp. 1196 (D.D.C. 1974)	26
Roe v. Wade, 410 U.S. 113 (1973)	58,60
Schloendorf v. The Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (Ct.App. 1914)	58

TABLE OF AUTHORITIES--Continued

	Page
Serena v. Leezer, No. 74-313 (W.D.Pa.) (filed April, 1974)....	35
Skinner v. Oklahoma, 316 U.S. 535 (1942).....	57,59
Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977).....	30
White v. Beal, 555 F.2d 1146 (3rd Cir 1977), aff'g 413 F.Supp. 1141 (E.D.Pa. 1976).....	54
STATUTES:	
42 U.S.C. §300.....	passim
42 U.S.C. §602.....	passim
42 U.S.C. §705.....	passim
42 U.S.C. §708.....	passim
42 U.S.C. §1396 et seq.	passim
42 CFR §50.204.....	passim
42 CFR §440.220.....	passim
43 CFR §50.209(a).....	passim
Title XIX, Social Security Act, §1903(5).....	passim
LEGISLATIVE HISTORY:	
95 Cong. Rec. H 10131 (daily ed., September 25, 1977).....	61
95 Cong. Rec. S 19813 (daily ed., December 15, 1977).....	25
BOOKS, ARTICLES AND TREATISES:	
ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY, a publication of the Alan Guttmacher Institute (1979).....	53

TABLE OF AUTHORITIES--Continued

	Page
ACUTE AND CHRONIC CONDITION AND MEDICAL CARE: OCTOBER 1963 - NOVEMBER 1964, a publication of the University of Puerto Rico and the Puerto Rico Department of Health.....	33
Ayres, Sterilizing the Poor, THE NATION (July 8, 1973).....	39
Bogue and Sigelman, Sterilization Report No.13: Continuing Violations of Federal Sterilization Guidelines by Teaching Hospitals in 1979, PUBLIC CITIZEN (July 17, 1979).....	52
Daily and Nicolas, Tubal Ligation on General Service Patients Seen by Peer Level Family Counselors in Thirty New York City Voluntary and Municipal Hospitals, 123 AM. J. OF OBSTETRICS AND GYNECOLOGY 656 (1975).....	24
Department of Health, Education and Welfare, Sterilization and Abortions: Federal Financial Participation, 45 Fed.Reg. 52 (1978).....	45
Eliot and Wilson, The Obstetrician's View, ABORTION IN A CHANGING WORLD, Columbia University Press (1970).	28
1 FAMILY PLANNING DIGEST 3 (1972).....	36,44
11 FAMILY PLANNING PERSPECTIVES 253 (1979).....	36
General Accounting Office, Report #B-164031(5).....	35

Page

Greenspan, THE COLLABORATIVE REVIEW OF STERILIZATION (CREST), paper presented to the American Public Health Association (Nov.2,1977)... 55

Hellman, Louise, M.D., The Sterilization of Minors and Others Legally Incapable of Consenting: A Review of Current Information, Public Health Center (December 28, 1973)..... 38

Law, Sterilization Comes Easier for the Disadvantaged, N.Y.U. LAW J. 16 (1976)..... 41

McGarrah, Sterilization Without Consent: Teaching Hospital Violations of HEW Regulations, Health Research Group (January 1975)..... 42

Presser, VOLUNTARY STERILIZATION: A WORLD VIEW - 5 REPORTS ON POPULATION/FAMILY PLANNING (1970)..... 33,35

Quay, Justifiable Abortion: Medical and Legal Foundations, 29 GEO.LAW J. 509 (1961)..... 34

Rosenfeld, Wolfe and McGarrah, Health Research Group Study on Surgical Sterilizations: Present Abuse and Proposed Regulations, Washington, D.C. (October 1973).. 43

Rothchild, Why Sterilization Guidelines are Needed (N.Y.C./ H.H.C. December 10, 1975)..... 24

San Juan Star, January 21, 1975, cited by EPICA Task Force, PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM (1976)..... 33

Page

Spriggs, Note, Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor, 4 NYU REV. OF LAW AND SOCIAL CHANGE 127 (Spring 1974)..... 41,44

Tietze, INDUCED ABORTION: 1979, a Population Council Fact Book (3rd. ed., 1979)..... 55

Vasques Calzada, LA SITUACION POBLACIONEL EN PUERTO RICO (1968)..... 33

Vaugh and Sparer, 6 FAMILY PLANNING PERSPECTIVES 224 (1974)..... 29

Westoff, C.A. and Westoff, C.F., FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA (1971)..... 36

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

CORA McRAE, ET AL.,

Appellees.

PATRICIA R. HARRIS, SECRETARY OF
HEALTH, EDUCATION AND WELFARE,

Appellant,

v.

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Appellee.

On Appeal from the United States
District Court for the Eastern
District of New York

BRIEF AMICI CURIAE OF THE ASSOCIATION OF LEGAL AID ATTORNEYS, ET AL.

INTEREST OF THE AMICI CURIAE

This brief of the Association of Legal Aid Attorneys of the City of New York, District 65, U.A.W; Baltimore Abortion Right; Comision Femenil Mexicana Nacional; Committee for Abortion Rights and Against Sterilization Abuse; Committee to End Sterilization Abuse; District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO; Education for Freedom of Choice in Ohio; Grand Jury Project; La Raza Legal Alliance; National Bar Association; National Conference of Black Lawyers; National Emergency Civil Liberties Committee; National Lawyers Guild; National Organization of Legal Services Workers; National Women's Health Network Reproductive Rights National Network; Rochester Women Against Violence Against Women; Social Service Employees Union, Local 371, District Council 37; United Electrical, Radio, and Machine Workers of America and the Women's Justice Center is submitted in support of the appellees with the oral consent of all parties. The consents will be filed with the Clerk of the Court.

Amici organizations all have been

actively involved in representing the interests of women adversely affected by the restrictions on Medicaid funding for elective and therapeutic abortions and involuntary sterilizations. Amici organizations are concerned that the Hyde Amendment, which denies Medicaid funding for abortions, forces poor, working and minority women to seek dangerous illegal abortions, and that the Hyde Amendment makes women increasingly vulnerable to sterilization abuse.

The ASSOCIATION OF LEGAL AID ATTORNEYS OF THE CITY OF NEW YORK - DISTRICT 65 - U.A.W. is a staff Union for all attorneys employed by the Legal Aid Society in New York City. The Association is the collective bargaining agent for the nearly 600 lawyers who have committed their skills to the representation of poor people charged with crimes. The Association recognizes the need for free and low cost medical assistance and is vitally committed to the existence of a statutory structure which allows its client community to be able to be eligible for funded abortions.

BALTIMORE ABORTION RIGHT is a community group which aims to make options available for women's reproductive choice. During the last year, it sponsored community symposia on abortion rights and sterilization abuse. Its

activities have been coordinated with national abortion rights projects.

The COMISION FEMENIL MEXICANA NACIONAL, with 2,000 members, is committed to furthering the interests of the Mexican-American community nationwide. It has initiated litigation against the State of California and doctors and hospitals to remedy sterilization abuse and it has fought for California's sterilization regulation; the first laws passed in the nation. The Comision was a plaintiff in the suit which enjoined California from implementing restrictions on MediCal funded abortions.

The COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA"). In August, 1977, CARASA launched the battle in New York City against the attacks on reproductive freedom posed by the Hyde Amendment and the Supreme Court's decisions upholding the states' refusal to fund elective abortions. A group of concerned women, afraid that poor women's limited access to abortion and the easy availability of sterilization would increase the incidence of sterilization abuse, founded CARASA. Two years later, CARASA has a constituency of 1,000 people and several hundred active members working in the community to educate and organize people

around the issues of reproductive freedom. It also works in the legislature to bring about legislation which would provide all women with unimpeded access to abortion, freedom from involuntary sterilization, safe and reliable contraception and a decent quality of life in which people can raise their children.

The COMMITTEE TO END STERILIZATION ABUSE ("CESA") is dedicated to protecting, through education, organizing, legislative work and oversight of hospital practices, the interests of people subject to sterilization abuse. It has ten nationwide affiliates comprised of health care workers, community activists and members of affected communities. CESA was one of the key groups involved in bringing about protective sterilization guidelines in the City of New York and in having these regulations adopted by the Department of Health, Education and Welfare.

Active in the struggle to restore Medicaid funded abortions, CESA believes that the unavailability of abortion and the continued funding for 90 percent of the cost of sterilization are critical factors contributing to sterilization abuse.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, R.W.D.S.U.,

AFL-CIO ("District 1199") represents 100,000 health care workers nationwide. Its membership is predominately Black, Latin and female. District 1199 is deeply involved in efforts to improve the quality of health care and to extend health care to all people. These efforts include support for the right of women to make free choices with regard to child bearing and the opportunity for women to freely utilize, without economic coercion, the necessary medical procedures to effectuate such choices.

EDUCATION FOR FREEDOM OF CHOICE IN OHIO, INC. ("EFCO") is a non-profit, tax-exempt organization, dedicated to community education on the need to secure safe abortion for all women who might choose it - rich or poor. EVCO serves as an information resource for various reproductive rights groups and groups opposed to sterilization abuse in Ohio. It is dedicated to enabling women to obtain the full range of family planning options without coercion, whether subtle or overt.

The GRAND JURY PROJECT was founded to assist persons who are victimized by grand jury abuse. In the past decade, activists in the movements for women's and gay rights have been among the primary targets of the Grand Jury. Support for the goals

of the women's movement leads to support for reproductive rights by the Grand Jury Project.

LA RAZA LEGAL ALLIANCE is an organization of Latino legal workers organized to take legal and political action against the oppression and exploitation of the Latino community. It is dedicated to the struggle for democratic and human rights of all Latino people, including the right to bilingual, bicultural education, medical care, jobs, decent housing, the right to organize, emigration and immigration freedom and the right to be free from racial, sexual and national discrimination.

La Raza Legal Alliance has eighty-three chapters located throughout the United States, with a membership of some five hundred people. Its National Office is located in Houston, Texas. It has commited its resources towards legal and political action to prevent sterilization abuse.

The NATIONAL BAR ASSOCIATION, founded in 1925, is a professional membership organization which represents more than 12,000 Black attorneys, Judges and law students. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. To effectuate its goal of racial and sexual equality, the National Bar

Association, through its Women's Division, has been actively involved in issues concerning child abuse and reproductive rights.

The NATIONAL CONFERENCE OF BLACK LAWYERS ("NCBL")is an activist legal organization of Black lawyers, law professors, Judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity, and racial and sexual equality.

The National Conference of Black Lawyers was chartered to work for the elimination of racism in the law and to address the problems of the Black community. Thus, NCBL, through its Women's Rights Task Force, is concerned with the discriminatory impact from cutbacks in funded abortions and the disproportionate impact of sterilization abuse. The NCBL is concerned that the inability of indigent Black women to obtain medically necessary abortions will have an adverse impact on their health and well-being.

The NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("ECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights and its extension to all our people -- particularly the poor and the powerless. Founded in 1951, the organization

has worked to achieve these goals through litigation and public education. Among the cases it has sponsored in this Court are Kent v. Dulles, 357 U.S. 116; Kleindienst v. Mandel, 408 U. S. 753, and Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154. Through similar means, it has sought to protect the right of reproductive freedom and the right to equal protection of the law at issue in this case.

The NATIONAL LAWYERS GUILD ("NLG") is an organization of 7,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, racial minorities and women.

In the past decade, its work to support the women's movement has become an organizational priority. The National Lawyers Guild, a founding member of the Reproductive Rights National Network, is actively involved in protection of reproductive rights for poor, minority and working women. Individual NLG members, in cases brought throughout the nation, represent litigants seeking to prevent cutbacks in funded abortions or attempting to end sterilization abuse.

The NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS ("NOLSW") is the Union representing the lawyers and legal workers who provide civil representation to the poor. Among its clients are destitute women who are denied the right to choose whether to bear a child merely because Medicaid arbitrarily will not pay for an abortion while funding is available for prenatal care and the costs of birth. NOLSW has dedicated itself to eliminating all forms of injustice to the poor. NOLSW stands opposed to any infringement upon the basic rights of people merely because of their poverty. It believes that the right to choose is of such personal consequence that it is not to be intruded upon by the government.

The NATIONAL WOMEN'S HEALTH NETWORK ("NWHN") is a national consumer organization which focuses on women's health. It has 2,200 members, 118 of which are organizations: including health care centers, consumer groups, women's health organizations and health education projects. Twenty percent of its individual members are physicians and nurses. It represents groups as diverse as the American Foundation for Maternal and Child Health and the American College of Nurses and Midwives. In the area of sterilization abuse,

NWHN currently is developing a manual to monitor the Department of Health, Education and Welfare sterilization regulations on a national basis. Other groups appearing herein as amici also are participating in this monitoring project.

The REPRODUCTIVE RIGHTS NATIONAL NETWORK is a national organization working to defend abortion rights and to end sterilization abuse and promote occupational safety and health throughout the country. The following organizations belong to the Reproductive Rights National Network: New American Movement; Abortion Action Coalition, Boston; Abortion Rights Coalition, Cincinnati; Buffalo CARASA; Chicago Women's Health Task Force; Chicago Women Organized for Reproductive Choice; Cleveland Pro-Choice Action Committee; International Socialists; International Socialist Organization; New York CARASA; Emma Goldman Clinic for Women, Iowa City, Iowa; Coalition for the Medical Rights of Women, San Francisco; Dayton Freedom of Choice, Dayton, Ohio; Committee to Defend Reproductive Rights, San Francisco; Eugene Socialist Feminist Task Force, Oregon; Hartford CESA; Healthright, New York City; Ithaca Reproductive Rights Task Force; Long Island CARASA; Michigan Coalition for Reproductive Rights; Minneapolis CARASA;

National Lawyers Guild; New Haven Feminist Union; Reproductive Rights Task Force, New Haven, Conn.; New Jersey CARASA; New York CESA; Philadelphia Reproductive Rights Coalition; Reproductive Rights Organizing Committee, Santa Monica, Ca.; Rochester Progressive Movement; St. Louis Pro-Choice Group; Union Wage, San Francisco; Women and Children's Rights Coalition, Portland, Oregon; and Reproductive Rights Organization, Madison, Wisconsin.

ROCHESTER WOMEN AGAINST VIOLENCE AGAINST WOMEN (Rochester "WAVAW") is a community organization of feminists formed in 1977 in Rochester, New York. It works against the violence which terrorizes and harms women. Some of its specific concerns are rape, battering, sexual harassment, reproductive rights, pornography and the cultural acceptance of degrading images of women as "chic" or entertaining.

The SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, DISTRICT COUNCIL 37, AMERICAN FEDERATION, STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO ("Local 371") is a 10,000 member Union of employees of the City of New York. Local 371 works in hospitals, social services, housing, community development, and other city human services agencies. At a Union

meeting in May, 1974, an overwhelming majority of its members went on record in support of abortion and against forced sterilization. The Union took this position because it was concerned with the negative impact restricted access to abortion has on the indigent. An obvious result of the restriction is unwanted children, with the accompanying problems of child neglect and abuse which can lead to foster placement and sometimes even death for the child. Adoption is not a viable alternative, as securing placements for these children often is extremely difficult.

Local 371 is concerned that having an unwanted child also leads to unemployability for the mother for a period of two to six years, and prevents the woman from developing the skills she will need to enter the job market. Young mothers are routinely forced out of school to attend to their children and never receive the basic education they need to secure employment.

Local 371 is cognizant of the fact that contraception is not available to girls or women in the poor neighborhoods of New York City. Contraception is not discussed in the schools, the birth control clinics developed during the War on Poverty have been closed by cutbacks in funding and the public hospitals

in New York City cannot meet this need since they are suffering from escalating cutbacks.

Local 371 expresses its general concern that the denial of funding for Medicaid abortions serves to perpetuate the cycle of poverty and despair for a large segment of our population.

The UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA ("UE") is a labor organization as defined by the National Labor Relations Act. It represents thousands of employees of manufacturers of electrical products and equipment, machinery, appliances machine tools and allied products throughout the United States and Canada. Women comprise approximately one-quarter of UE's membership.

The UE was founded in 1936 for the purpose of uniting employees, regardless of craft, age, sex, nationality, race, creed or political belief in order to improve their working and living conditions. To that end, the Union has, since its inception, opposed discrimination against women, particularly poor and working women.

At its most recent convention in September, 1979, the UE membership resolved that: "Our Union support the right of all women, if they so choose, to obtain safe, legal abortions and that we oppose cutbacks in

Medicaid funding for abortions."

Only with the right to choose whether and when to bear children can women participate fully, actively, and unite in the fight to improve conditions for all.

The WOMEN'S JUSTICE CENTER is an incorporated, tax-exempt, public interest organization, founded in 1976 in Detroit, Michigan. It operates several different programs, including: a telephone referral service; a speaker's bureau and the initiation of litigation. It recently filed a case concerning two Detroit High School women who were denied admission into the honor's program because they were single mothers. It also has litigated cases concerning pregnacy discrimination.

SUMMARY OF ARGUMENT

The Hyde Amendment restrictions on Medicaid abortion funding, coupled with the availability of public funding for sterilization, compel many Medicaid recipients to resort to irreversible sterilization to avoid unwanted or medically injurious pregnancies. This coerced sterilization invidiously discriminates against poor and minority women and deprives them of their constitutional rights to privacy, liberty and equal protection.

I.

Sterilization abuse is the involuntary termination of reproductive capacity. Sterilization is involuntary when a woman is not informed that the procedure is being performed, or is misinformed, or is overtly coerced into consent (e.g., by the threat of denial of other medical services).

Similarly, a woman's consent is involuntary when given in default, because other reasonable choices are foreclosed. Many women wish to avoid an unwanted pregnancy while retaining their childbearing capacity. When they are nonetheless forced to undergo sterilization because of the unavailability of abortion, they are not

voluntarily consenting; they are merely acquiescing to force majeure.

Prior to legalization of abortion women were often able to obtain an abortion only if they would agree to concurrent sterilization. Racial minorities and welfare recipients were sterilized in much higher percentages than whites and non-recipients. Case law and government studies are replete with evidence of sterilization abuse among Puerto Rican, Native American, Black, and Mexican American women and among welfare recipients in general. Studies of medical practice in teaching hospitals reveal that both tubal ligations and hysterectomies have been routinely performed on poor and minority women with no justification other than the training needs of interns and residents.

The Department of Health, Education, and Welfare recognized these abuses in drafting new sterilization regulations. Even if there were full compliance with the regulations, however, sterilization abuse would continue unless abortion is fully available to Medicaid recipients.

II.

Just as women turned to sterilization out of fear of unwanted pregnancies

prior to the legalization of abortions, so they are now denied reproductive choice by unconstitutional restrictions on public expenditures. The most reliable forms of birth control, the pill and the IUD, present serious medical risks to many women. Poor women who turn to self-induced or back-alley abortions in the face of unwanted pregnancy face even greater risks. Thus, sterilization, although a drastic measure for women who are not ready to end their reproductive lives, becomes the lesser evil. The discrepancy in funding for abortion and sterilization forebodes a return to this "package deal."

III.

The disparity of funding between abortion and sterilization has the effect of compelling poor and minority women to be sterilized in violation of their constitutional rights.

This disparity is inconsistent with the purpose of the medical provisions of the Social Security Act which were promulgated to provide medical assistance to all eligible individuals for all medically necessary services.

The Hyde Amendment is inconsistent with the family planning services provisions

which mandate that consent to sterilization be voluntary and not coerced.

As long as the Hyde Amendment remains in effect, the medical assistance provisions of the Social Security Act operate as a sterilization law, which places Medicaid recipients in a coercive situation tantamount to state-induced sterilization. The funding disparity also violates a woman's constitutionally protected right to choose whether or not to be sterilized, which is derived from the right to privacy in making reproductive choices. The effect of the funding disparity does not survive the strict scrutiny to which sterilization laws are subject. Minority women, who rely on public funding for abortion in far greater proportions than white women, are the victims of invidious discrimination.

No compelling state interest justifies either the invidious discrimination or the impingement on a woman's privacy rights which the discrepancy in funding represents. Any asserted governmental interest in promoting childbirth over abortion is clearly contradicted by funding for sterilization, which in fact discourages childbirth.

To compel poor and minority women to forfeit their fertility in order to prevent an unwanted pregnancy is constitutionally impermissible.

ARGUMENT

INTRODUCTORY STATEMENT

Amici believe that the Hyde Amendment restrictions upon government funding for medically necessary abortions force many poor women who may need such abortions to select irreversible sterilization procedures as the only way to prevent injurious and unwanted pregnancies. Such sterilizations are involuntary and coerced. The federal government denies federal funds for virtually all abortions, while assuring full Medicaid funding for the sterilization of poor women, with 90 percent of the costs met by federal funds. The dangers inherent in this policy can be understood only in the context of past and present involuntary sterilizations performed upon poor and minority women.

Amici believe that the disparity in funding for abortion and sterilization results in a violation of the Equal Protection Clause of the Fourteenth Amendment. The Hyde Amendment restrictions are inconsistent with the most basic purpose of the Social Security Act's Medicaid provisions and fail to provide all medically necessary procedures to all eligible individuals on an equitable basis. This results in an unequal and therefore unconstitutional application of the law which

bears no rational relation to any legitimate state purpose. Finally, amici oppose the restrictions on funding for medically necessary abortions on the ground that they place an impermissible burden on a woman's constitutionally protected right to privacy in matters of reproductive choice.

While confining themselves to the discussion herein, amici urge this Court to affirm on the basis of all arguments which are set forth by appellees.

I.

HISTORICAL EVIDENCE DOCUMENTS STERILIZATION ABUSE AMONG POOR AND MINORITY WOMEN.

A. Sterilization Abuse Defined.

Sterilization abuse is the involuntary termination[1] of reproductive capacity. It occurs when a woman is sterilized as a result of economic coercion; when a woman is sterilized without understanding the irreversible nature of the operation; when a woman is sterilized for lack of viable alternatives from which to choose.[2]

Sterilization abuse has taken and continues to take a variety of forms. This was explicitly recognized by the Department of Health, Education and Welfare in promulgating regulations designed to protect people

[1] "An act is voluntary if it is intentional and not induced by coercion. An agreement to be sterilized is a contract...(s)afeguards are especially appropriate where the Federal Government is financing an intrusion on a citizen's body which has a permanent effect on the reproductive process." Relf v. Mathews, 403 F. Supp. 1235, 1238 (D. D.C., 1975).

[2] Throughout, amici address issues of sterilization abuse which affect women, since the abortion-funding issue only concerns women. Sterilization abuse can also affect men, although there is little documentation on systematic male sterilization available.

from this abuse.[3]

[3] The DHEW regulations were adopted by the Secretary on November 8, 1978 and became effective 90 days after adoption. The Regulations apply to all government-funded sterilizations.

Most importantly, the Regulations provide that:

"(e) Informed consent may not be obtained while the individual to be sterilized is (i) In labor or childbirth; (ii) Seeking to obtain an abortion." (emphasis added) 42 CFR 50.204 (1978).

This is a clear acknowledgement of the particular pressures upon women seeking abortions and the interrelationship between the abortion decision and sterilization abuse.

Women's consent to sterilization has been coerced under threat of withholding essential government benefits or medical treatment or as the price for obtaining an abortion. Women have been incorrectly told that their sterilizations were reversible. "Consent" to sterilization has been extracted from women while they were hospitalized for childbirth, or abortion. These extremely stressful situations are hardly conducive to thoughtful reflection on a profound life-choice. Women also have been sterilized without understanding the consequences of the surgery when there has not been an explanation in their primary language.[4/]

[4/] See Daily and Nicolas, Tubal Ligation on General Service Patients Seen By Peer Level Family Planning Counselors in Thirty New York City Voluntary and Municipal Hospitals, 123 AM. J. OF OBSTETRICS AND GYNECOLOGY, 656, 657 (1975), and Rothchild, Why Sterilization Guidelines are Needed, at 3 (N.Y.C./H.H.C., December 10, 1975).

Sterilization abuse can occur when doctors' interests conflict with their patients' health and welfare. The sterilization procedure is urged on patients for a variety of reasons: because it provides an opportunity for inexperienced doctors to practice surgical techniques; because the availability of federal funds for reimbursement makes it profitable to health-care providers; or because it circumvents the legal restrictions on simultaneously performed abortions.[5/]

Sterilization abuse historically has had a disproportionate impact on both poor and minority women.[6/] Indigent women

[5/] Physicians' attitudes toward the poor contribute to sterilization abuse. As Dr. Donald Sloan of Metropolitan Hospital in New York has said, "We practice on the poor so we can operate on the rich. Hysterectomies and simple tubal ligations are performed all the time just for the practice." Medical Tribune, September 21, 1977, reprinted in the 95 Cong. Rec. S 19813 (daily ed., December 15, 1977). See also Section I.C., infra.

[6/] See Section II B., Infra.

have always been particularly vulnerable to coercion in making the sterilization decision.[7] With the withdrawal of Medicaid funds for abortions, the economic coercion exerted on poor women takes on a new and more drastic character. Women who at any given time know they cannot support an additional child, either economically or emotionally are faced with a Hobson's choice: accept irreversible sterilization; seek unsafe or costly abortions; or remain exposed to the risk of unwanted and injurious pregnancies until the onset of menopause. Whenever a woman is forced to choose sterilization because she knows that a safe, legal abortion will not be available should contraception fail, that

---

[7] Judge Gessell remarked that there was a growing number of sterilizations among poor people, stating: "Few realize that over 16 percent of the married couples in this country between the ages of 20 and 39 have had a sterilization operation. Over the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs." Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D. D.C. 1974).

woman is the victim of sterilization abuse.[8]

B. Prior to the Legalization of Abortion, Doctors Conditioned Abortion on a Woman's Agreement to Concurrent Sterilization.

The reasons doctors required sterilization as a condition of abortion prior to legalization were twofold. First, they were subject to criminal penalties for wrongfully certifying that an abortion was necessary to preserve the life of the woman. If a doctor indicated that medical risk was severe enough to warrant sterilization, this bolstered the doctor's justification for certifying the abortion. Secondly, if a doctor sterilized the woman by hysterectomy, the abortion did not have to be reported since it was incident to the removal of all reproductive organs.

---

[8] However, sterilization abuse has an impact on working women as well. Recently several women employees at American Cyanamid revealed that they had been given a "choice" of either agreeing to sterilization or suffering demotion or loss of employment. Christman v. American Cyanamid Co., No. 80-0024-P (N.D.W.V.) (Filed January 29, 1980).

Requiring that a woman agree to be sterilized as the price for an abortion was therefore a common practice throughout the United States.[9] This requirement was applied to at least some of the patients in 53.6 percent of the teaching hospitals surveyed by the American College of Obstetricians and Gynecologists and the American Public Health Association.[10]

A return to the pre-1973 criminal standards for federal funding of abortions forbodes a return to this package deal: doctors will agree to perform funded abortions in return for the woman's "consent" to sterilization, either to justify the diagnosis for certification, or to obtain reimbursement for the sterilization procedure instead of the abortion.

9/ Bingham, T. 476.

10/ Eliot and Wilson, The Obstetricians' View, ABORTION IN A CHANGING WORLD, 93 Columbia University Press (1970).

C. Sterilization Abuse Has Had a Disproportionate Impact Upon Poor and Minority Women.

The incidence of sterilization abuse in federally funded family planning programs was exposed in the case of Relf v. Weinberger, 372 F. Supp. 1196 (D.C. 1974). The Relf sisters and three black teenagers from Alabama were refused medical assistance unless they consented to sterilization. Two of the Relf children, 12 and 14 years old, were sterilized without their parents' knowledge or consent.[11]

The Relf Court, finding on behalf of the victims of sterilization, stated:

11/ A subsequent investigation found that the same Alabama clinic had sterilized 11 young girls, 10 of them black. A study by DHEW's Center for Disease Control found that a total of 153 women under the age of 18 had been sterilized in funded family planning programs during 1972. Vaughan and Sparer, 6 Family Planning Perspectives 224 (1974).

> "...there is uncontroverted evidence in the record that minors and other incompetents have been sterilized with federal funds and that an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization. Patients receiving Medicaid assistance at childbirth are evidently the most frequent targets of this pressure as the experience of plaintiffs Water and Walker illustrate." Id. at 1199.

Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977) provides a striming illustration of many Medicaid recipients' vulnerability to sterilization abuse. Dr. Pierce, the only doctor in a rural county hospital who accepted Medicaid patients, admitted that he refused all medical treatment to his financially dependent patients unless they would submit to sterilization after the birth of their third child.

Minority women whose primary language is not English are extremely vulnerable to sterilization abuse. In Madrigal v. Quilligan, No. 75-2057 (C.D. Cal. 1978), ten

Mexican-American women who were sterilized without consent sued the University of Southern California, Los Angeles Medical Center. One of the women who discovered that she had been sterilized while she was hospitalized for a Caesarian when she subsequently returned to the hospital to obtain contraception. Her hospital consent form was signed by her common law husband who thought that he was consenting to the Caesarian. The other women in Madrigal were persuaded to sign consent forms while they were in labor and anesthetized. The plaintiffs were not informed that the operation was irreversible; their consents were obtained in English although only one of the women was fluent in English.[12/]

Representative of another vulnerable group of women is the plaintiff in

---

12/ The plaintiffs in Walker and Madrigal were unsuccessful. In Walker, the Court held that the doctor's policy did not involve state action and therefore was not subject to judicial review. In Madrigal, the plaintiffs failed to show that the doctors had acted intentionally and in bad faith.

Johnson v. The City of New York, No. 10784/77 (Sup. Ct. N.Y., Kings Cty., filed 1977).This 19 year old black woman was taken from Rikers Island Prison to Kings County Hospital for an abortion. When she was asked whether she wanted any more babies "now" she was told that her tubes could be tied, and then untied once she was a "good girl." Thus, she intentionally was misinformed about the irreversibility of the procedure.[13]

Coercion, resulting from the unavailability of abortion, especially among a largely non-white population, is demonstrated by the history of sterilization in Puerto Rico. Nowhere in the United States are sterilization figures higher.

In 1965, 34 percent of women between the ages of 20 and 49 had been steril-

[13] In Johnson, the New York City sterilization guidelines were violated both with respect to the thirty day waiting period as well as the prohibition against sterilizing persons under age 21.

ized.[14] In 1968, the figure for sterilized women in the same age grouping had risen to 35.3 percent. The sterilization rate among Puerto Rican women with incomes below $5,000. was 43.8 percent.[15] Of the entire group of women sterilized, 36.1 percent expressed post-operative dissatisfaction.[16]

[14] University of Puerto Rico and Puerto Rico Department of Health. ACUTE AND CHRONIC CONDITION AND MEDICAL CARE: OCTOBER 1963-NOVEMBER 1964. In Puerto Rico, sterilization was so common that it was referred to as la operacion (the operation).

[15] Vasquez Calzada, LA SITUACION POBLACIONEL EN PUERTO RICO, 1968.

[16] Presser, VOLUNTARY STERILIZATION: A WOPLO VIEW - 5 REPORTS ON POPULATION/FAMILY PLANNING 1 (1970) at 50. One reason offered for this high regret rate is that doctors neglect to give women sufficient information about the psychological and possible physiological side effects which may result from sterilization. San Juan Star, January 21, 1975, cited by EPICA Task Force. PUERTO RICO: A PEOPLE CHALLENGING COLONIALISM (1976), at 46.

The high sterilization rate and perhaps the high regret rate in Puerto Rico since 1965 appears to be related to the inaccessibility of either abortion or birth control. Abortion was illegal and violators were subject to imprisonment for two to five years,[17] Low income women were subjected to the most stringent eligibility restrictions.[18] Sterilizations of Native American women also are alarming. That many Native American women are dependent upon public health facilities which makes them particularly vulnerable to sterilization abuse was confirmed by a 1976 General Accounting Office survey. This survey revealed that 3,000 female sterilizations had been performed in a four year period in the federally funded facilities of the Indian

17/ Quay, JUSTIFIABLE ABORTION: MEDICAL AND LEGAL FOUNDATIONS, 29 Geo. Law J. 509 (1961).

18/ Id. at 509. Only wealthy women could afford a black market abortion. While government funds were unavailable for abortion and were inadequately used to counsel women in birth control methods, 90 percent of the cost of funded sterilizations was provided by the federal government.

Health Service.[19]

Before public funding for abortions was available, black women were sterilized at a rate which was double the rate affecting white women. A 1970 study shows that approximately 16 percent of all Black married women of child bearing age were sterilized as compared to the 7 percent of all married white women in that same category.[20] It should be noted, however, that once publically funded abortions became available, the disparity in sterilization between black and

19/ General Accounting Office Report # B-164031 (5). This survey revealed many specific abuses. The consent forms which were on file were "generally not in compliance with .... regulations." The most widely used consent form "did not indicate that the basic elements of informed consent had been presented orally to the patient." The GAO report also exposed 13 sterilizations of minors and 13 violations of the 72 hour waiting period which was then in effect. Individual Native American women have sued for sterilization abuse. See Serena v. Leezer, No. 74-313 (W.D. Pa.) (filed April 1974) brought by a Shawnee Indian against health and welfare officials in Armstrong County, Pennsylvania for sterilizing her without her knowledge or consent after the delivery of her youngest child.

20/ Presser, Op. cit.

white women evened out.[21]

Although comparable national data is not available for Hispanics in the United States, a study of New York City voluntary and municipal hospitals made in 1973 concluded that the proportion of Spanish-speaking women sterilized was almost three times as great as the proportion of black women and six times as great as the proportion of white women.[22]

---

[21] 11 FAMILY PLANNING PERSPECTIVES 253 (1979).

[22] C.A. Westoff and C.F. Westoff, FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA, 22 (1971). A 1972 study which compared female sterilization patients to all female family planning patients revealed striking racial and ethnic disparities. White women comprised 53 percent of all family planning patients but only 40 percent of the sterilization patients. In contrast, while only 11 percent of all family planning patients were Hispanic, 17 percent of the sterilization patients were Hispanic. This study also indicated that 37 percent of the family planning patients were black which was compared to the 43 percent of the sterilization patients who were black. Vaughan and Sparer, op. cit. at 225.

A 1972 study revealed that non-white women were sterilized in much larger numbers than their representation in the population of all family planning patients, and in greater percentages than white women.[23] The same study revealed a similar disparity between women receiving public assistance and non-recipients.[24]

---

[23]

	Percentage of total sterilization patients	Percentage of total family planning patients
whites	40	53
Hispanics	17	11
blacks	43	37

Vaughan and Sparer, op. cit. at 225

[24] Public assistance recipients constituted 28 percent of all female sterilization patients in 1972 although they constituted only 16 percent of all female family planning patients. Non-recipients constituted 72 percent of all sterilization patients but 84 percent of all family planning patients. Even when these numbers are adjusted to take into account both the age and number of children of sterilization patients (utilizing the theory that the older the woman is and the fact that she has more children increase the likelihood that sterilization was voluntary), there remains a positive correlation between those on public assistance and their rate of sterilization. When the data is controlled for the age and the number of children, the difference between white and non-white welfare

cont'd.

Black women under 21 years of age have been reported to be sterilized with greater frequency than white women of the same age.[25]

Although comprehensive figures are not available on the incidence of sterilization since the passage of the Hyde Amendment, data now being collected indicates that a number of states curtailed abortion funding and at the same time increased expenditures

24/ ... cont'd.
recipients in 1972 becomes striking. For whites, the sterilization rate of welfare recipients falls below that of non-recipients. But for non-whites the data suggest that welfare recipients have about one-third more sterilizations than non-recipients. Id.at 228-229.

25/ Hellman, Louise M., M.D., The Sterilization of Minors and Others Legally Incapable of Consenting: A Review of Current Information, Public Health Center (December 28, 1973).

for sterilizations.[26]

26/

States with a higher than average Medicaid sterilization rate where sterilization spending increased in 1978 while Medicaid funding for abortion was curtailed	Medicaid abortions 1977	1978
Alabama	1000	9
Arkansas	677	0
Idaho	100	21
Indiana	0	4
Nebraska	500	0
New Hampshire	200	1
West Virginia	low in both yrs.	
Wyoming	100	0

Interview with Joy Dreyfoos, Fellow, Alan Guttmacher Institute, in New York City (March 11, 1980).

Non-white women rely on Medicaid funding for abortion in much larger proportion than white women. Over 38 percent of all black and other minority women rely on funding as contrasted with 7 percent of white women who avail themselves of funded abortions. Ayres, Sterilizing the Poor, THE NATION, (July 8, 1973).

The logical inference from these statistics and facts is that minority women on public assistance are sterilized in greater numbers because they depend in greater numbers on publicly funded abortions. When public funds are not available for abortions, as was the situation in 1972, these women must turn to sterilization which was and continues to be funded.

D. The Sterilization of Poor and Minority Women for Medical Training Adds to the Probability of Sterilization Abuse.

Sterilization of Medicaid patients to accommodate the training needs of interns and residents[27] is a common phenomenon.

"There has been a virtual epidemic of sterilizations in American teaching hospitals where the 'pushing' and 'hard selling' of sterilization has been directed almost exclusively to poor and minority women, many of whom agree to the operation under duress."[28]

---

[27] In order to obtain certification from the American Board of Surgery, or the various surgical subspecialty groups, doctors in training must perform or assist at a certain number of operations. Law, Sterilization Comes Easier for the Disadvantaged, N.Y.U. Law Journal 16 (1976).

[28] Spriggs, Note, Involuntary Sterilization: An Unconstitutional Menace to Minorities and the Poor, 4 NYU Review of Law and Social Change 127, 131 (Spring 1974).

Major teaching hospitals have routinely violated DHEW Regulations promulgated to prevent such abuses.[29]

Dr. Sloan testified in the lower court to the use of tubal ligations to train interns and residents in surgical procedures because the operation is so simple to perform, citing instances where "resident training" was the only medical reason indicated for performing the sterilization.[30] Training considerations also may cause physicians to pressure patients into consenting to hysterectomies instead of less radical

---

29/ A survey of the 50 largest U.S. teaching hospitals, nine months after court ordered HEW regulations to prevent coercive non-therapeutic sterilizations became effective, revealed that 33% were not even aware of the legal requirements and that 76% were in violation of the regulations. McGarrah, Sterilization Without Consent: Teaching Hospital Violations of HEW Regulations, Health Research Group (January 1975).

30/ Tr. 1657, 1711, 1723, 1727.

sterilization procedures.[31]

The cultural bias of many doctors,[32] as well as the need for training, causes doctors to set aside the patient's interests. As Dr. Richard Hauskneck, a New York City obstetrician-gynecologist, explained:

> "Most physicians come from the upper one percent of White American society. The only contact we had with poor blacks and Puerto Ricans is as servants. So a vast majority of doctors feel that blacks and Puerto Ricans are less worthy. When you superimpose racism over the pressing desire for training, you arrive at the present situation. Some white obstetricians... think nothing at all of interfering with the procreative process of black

---

31/ At Boston City Hospital, the Health Research Group reported the following conversation: "When the student asked the resident why this woman was having a hysterectomy instead of a tubal ligation, he was told,...'we like to do a hysterectomy, it's more of a challenge...you know a well-trained chimpanzee can do a tubal ligation...and it's good experience for the junior resident." Rosenfeld, Wolfe and McGarrah, Health Research Group Study on Surgical Sterilization: Present Abuse and Proposed Regulations, Washington, D.C. (October 1973), at 3.

32/ A Planned Parenthood study of physicians attitudes, for instance, disclosed that 94 percent of the obstetrician-gynecologists in the survey favored compulsory sterilization or

cont'd.

and Puerto Rican women."[33]

[32]...cont'd.
withholding of welfare support for additional children of welfare mothers with out of wedlock children. 1 Family Planning Digest 3 (1972).

[33] Spriggs, op. cit. p. 131 n. 44

II.

WOMEN CANNOT VOLUNTARILY CONSENT TO STERILIZATION WHEN VIABLE OPTIONS ARE PRECLUDED OR CONSENT IS COERCED

A. Sterilization Abuse Results from the Implementation of the Hyde Amendment Restrictions on Abortion Funding.

The unavailability of abortion forces women to choose between life-threatening or unreliable contraceptive techniques and sterilization.

The Hyde Amendment has deprived most poor women of the option of using abortion when contraception fails.[34] Given that the most reliable forms of contraception, the pill and the IUD, present health dangers to many women,[35] indigent women's choices are

[34] Abortion rates in the states which have adopted restrictive payment standards for abortion have declined an average of 98.2 percent.

[35] Birth control pills have a 98 percent effectiveness rate but are linked in some women to depression, increased tendency to abnormal blood clotting, increased risk of heart attack and stroke (especially in women over 35 who smoke), and a small increased risk of liver or gall bladder disease. IUDs have a 96 percent effectiveness rate but have been linked in some women to irregular periods, cramps, and increased risk of infection of the uterus. DHEW, Sterilization and Abortions: Federal Financial Participation, 43 Fed. Reg. 52, 168 (1978.

severely limited. Women who use the medically safer but less reliable diaphragm or condom are most likely to become pregnant.[36] Once pregnant, indigent women can "choose" between an unwanted and/or medically injurious pregnancy and a back-alley or self-induced abortion.

It is not surprising that women agree to sterilizations when the lack of access to abortion is considered along with the drawbacks of available forms of contraception and these considerations are balanced against fully funded sterilizations. It is also understandable that doctors may encourage patients eligible for public assistance to choose sterilization, since it may be the safest medical alternative which is

---

[36] Diaphragms have an 85-90 percent effectiveness rate and Condoms are 90 percent effective. Id.

available to them.[37]

Prior to legalization of abortions, women had surgical tubal ligations out of fear of future, unwanted pregnancies.[38] Lack of funding for medically necessary abortions will take a similar toll. Dr. Sloan, who testified from his own experience with poor women and the pressures on them to be sterilized, believes that the funding policies are inherently coercive:

---

[37] Many women continue use of the pill and the IUD despite the danger inherent in these forms of contraception because they wish to retain the possibility of having a child at some time in the future, despite their fear of pregnancy. As Frederick Jaffe, Founder and President of the Alan Guttmacher Institute testified, if abortion was available, women could switch from life endangering pills and IUDs to the diaphragm and condom, and deaths arising from fertility control would decrease. T. 1474. A recent study of fertility control and mortality rates found that "At all ages, the lowest level of mortality by far is achieved by the combined regimen, that is, use of traditional contraception methods with recourse to early abortion in case of failure. (Pl.'s Ex. 16)

[38] Sloan, T., 1676. Dr. Sloan is a practising physician and assistant clinical professor of Obstetrics and Gynecology at New York Medical College.

> We have the one factor of the encouragement of sterilization and the other factor that if she has not got accessibility to the abortion status, and she knows it, her yielding will be that much greater. I see the handwriting on the wall.[39]

[39] Sloan, T. 1675.

B. Sterilization Abuse Results from Uneven Enforcement and Inadequate Monitoring of the Department of Health, Education and Welfare Guidelines.

A woman faced with the risk of having a child whom she is unable to support, financially and emotionally, is subject to coercion analogous to the past practice of threatening Medicaid recipients with termination of government benefits for refusal to be sterilized.[40] The only certain way

[40] The DHEW Regulations recognized the coercive impact on Medicaid recipients of the threat to cut off government benefits and designed the sterilization consent form with a notice in bold face appearing at the top. It reads: "Notice: YOUR DECISION AT ANY TIME NOT TO BE STERILIZED WILL NOT RESULT IN THE WITHDRAWAL OR WITHHOLDING OF ANY BENEFITS PROVIDED BY PROGRAMS OR PROJECTS RECEIVING FEDERAL FUNDS."

The second paragraph of the consent form reiterates the guarantee: "...If I decide not to be sterilized, my decision will not affect my right to future care or treatment and I will not lose any help or benefits from programs receiving Federal funds, such as AFDC or Medicaid, that I am now getting or for which I may become eligible." 43 CFR Sec. 50.209(a) (1978).

for an indigent woman to avoid an unwanted pregnancy, as long as abortion is unavailable, is to permanently terminate her reproductive capacity. The DHEW regulations, while admirably motivated, can do nothing to alter this hard fact.

The regulations specifically provide that a woman may not consent to sterilization if she is hospitalized for an abortion, but a woman and her doctor may easily circumvent this regulation if they are determined to do so,[41] By simply agreeing not to disclose the fact that there has been an abortion incident to sterilization, the doctor obtains reimbursement from Medicaid, and the woman terminates her pregnancy, but

[41] 42 CFR 50.204 (e) (1978) provides that: "Informed consent may not be obtained while the individual to be sterilized is...(ii) Seeking to obtain or obtaining an abortion. ...". See also, 45 CFR §205.35.

at the cost of her reproductive capacity. Moreover, prior history[42] and a recent study by the Public Citizen Health Research Group indicate the inability of the DHEW to effectively enforce the regulations it has

[42] As Judge Gesell stated in Relf v. Mathews,

> ...HEW is not sufficiently funded to enable it systematically to monitor individual decisions to sterilize. Thus HEW must depend in substantial degree on a complex series of procedures to be undertaken by persons not realistically subject to supervision and control or otherwise responsive to Congress. The experience with other phases of the sterilization problem shows the extreme difficulty that HEW is having in monitoring even the simplest safeguards.

403 F. Supp. 1235, 1238, vacated as moot 565 F. 2d 722 (D.C. Cir. 1977).

promulgated.[43]

43/ Bogue and Sigelman, Sterilization Report No. 13: Continuing Violations of Federal Sterilization Guidelines By Teaching Hospitals in 1979, PUBLIC CITIZEN (July 17, 1979).

This study was based on a survey of teaching hospitals in the United States with approved obstetrics/gynecology residency programs. Among the most shocking results of the study were the following:

(1) 70 percent of the responding hospitals, by 1979, had not yet complied with the less stringent 1974 DHEW regulations Id. at 4;

(2) 14 percent of the responding hospitals had not even received copies of the 1978 regulations. Id at 5;

(3) 21 percent of the responding hospitals continued to perform prohibited hysterectomies solely for family planning purposes. Id. at 5; and

(4) The rate of non-compliance for those hospitals refusing to complete the questionnaire may be considerably greater than that of hospitals which were willing to make public their sterilization practices. Id at 5.

The study also indicates that even if the regulations were to be enforced in the future, the only available sanction by the DHEW would be a denial of Medicaid reimbursements after the sterilizations were actually performed and permanent damage done.

III.

DENYING FUNDING FOR MEDICALLY NECESSARY ABORTIONS WHILE PROVIDING FUNDING FOR STERILIZATION FORCES POOR AND MINORITY WOMEN TO BE STERILIZED, IN VIOLATION OF THEIR CONSTITUTIONAL RIGHTS TO PRIVACY AND EQUAL PROTECTION.

A. Implementation of the Hyde Amendment Results in a Funding Disparity which Undermines the Purposes of the Social Security Act.

By providing full funding for sterilization, while restricting funding for medically necessary abortions,[44] the state creates a funding disparity which effectively

44/ The Medicaid statutes make "family planning services," including sterilization mandatory. 42 U.S.C. Sec. 1396d(a)(4)(B); 42 CFR Sec. 440.220. States must pay for such services at a rate not less than 40 percent of the non-federal share. 42 USC Sec. 1396 a(2). The federal government picks up 90 percent of the cost and states fund the rest. Title XIX Sec. 1903(5). In effect, sterilization is fully funded. On the other hand, "Publicly funded abortions for the poor declined by 99 percent in Hyde Amendment States...The reason: Doctors and institutions have been unwilling to risk performing abortions that...might (not be) reimburse(d)... Patients are afraid or ashamed to report cases of rape or incest, and are misinformed ...about whether the government will pay for any abortions." (Emphasis in original). ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY, a publication of the Alan Guttmacher Institute (1979), at 24.

coerces the sterilization of Medicaid recipients who fear unwanted pregnancies.

This funding disparity is contrary to the purpose of Title XIX of the Social Security Act, which establishes a Medicaid program to provide medical assistance to all eligible individuals for all medically necessary services. Services provided are to be equal in amount, duration and scope, within included categories, for all recipients covered.[45] Courts have interpreted the statute to mean that such services must be distributed in a manner which bears a rational relationship to the basic federal purpose of providing medical services to those in greatest need of them.[46]

45/ 42 U.S.C. Sec. 1396 et seq.

46/ White v. Beal, for example, held that a state must demonstrate a reasonable relationship to medical need when choosing to fund one procedure rather than another under Medicaid. 555 F.2d 1146 (3rd Cir. 1977), aff'g 413 F. Supp.1141 (E.D.Pa. 1976). See also 42 CFR Sec. 440.200(2), which states that restraint on funding can only be based on medical necessity.

The basic federal purpose underlying the statute is clearly undermined by forcing indigent women to undergo sterilization. No health interest is served by sterilizing women who would prefer to maintain their childbearing capacity if abortion were available.[47] Therefore, the funding disparity bears no rational relationship to the basic purpose of the Act.

The Hyde Amendment restrictions also undermine the statutory provisions authorizing funding for family planning services which state that consent to sterilization must be voluntary.[48] In order to make

47/ Compare the major complication rate for tubal ligations (2.8 per 100 women) and hysterectomies (17.9 per 100 women), with the major complication rate for abortion (0.4 to 2.3 per 100 women, depending on gestation period). It must be concluded that abortion is a medically safer procedure. Sources are: Greenspan, THE COLLABORATIVE REVIEW OF STERILIZATION (CREST) paper presented to the Am. Pub. Health Assoc. (Nov. 2, 1977); and Tietze, INDUCED ABORTION: 1979, a Population Council Fact Book (3d ed., 1979).

48/ 42 CFR Sec. 441.20 states that decisions made by patients in the area of family planning services must be free from coercion. See also 42 U.S.C. Secs. 300a-5; 602(a)(15); 708(a); 705(a)(14).

a voluntary choice regarding sterilization, a person must be able to choose from a reasonable range of the available methods of reproductive care. When that range is so severely proscribed as to make "choice" illusory, a person's reluctant acquiescence hardly falls within the concept of voluntariness. Sterilizations performed as a result of the kinds of coercive pressures noted above do not meet the requirement of voluntariness which is statutorily mandated.

B. Under the Hyde Amendment, the Medical Provisions of the Social Security Act Become, in Effect, a Sterilization Law Which Invidiously Discriminates Against Poor and Minority Women.

The disparity of funding resulting from the Hyde Amendment renders the medical assistance provisions of the Social Security Act a de facto sterilization law which robs Medicaid recipients who fear unwanted pregnancies of the ability to control their own procreativity. This Court has held that the classifications in a state's sterilization law are subject, under the Equal Protection Clause, to strict scrutiny to determine whether they invidiously discriminate against

groups or types of individuals.

In Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), this Court noted that "... (t)he power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

A law mandating sterilization of minority women would clearly be repugnant. Amici believe that the disparity of funding between abortion and sterilization subjects poor, and, especially, minority women[49/] to coercion tantamount to state induced sterilization. Coerced sterilization of Medicaid recipients, especially minority women in the program, results in invidious discrimination which fails the strict scrutiny test of Skinner. Id. at 541.

C. The Disparity in Funding Results in an Impermissible Burden on a Woman's Right to Privacy, Which Includes the Right to be Free from Involuntary Sterilization.

As Judge Cardozo noted in

49/ Justice Marshall, dissenting in Beal v. Doe 432 U.S. 438, 459, n.3 (1977) presented documentary evidence of the disparate importance and impact that abortion as a family-planning method has on minority women as opposed to non-minority women.Cont'd.

Schloendorff v. The Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (Ct. App., 1914), "(e)very human being of adult years and sound mind has a right to determine what shall be done with his own body."

This common law right to control one's body has assumed constitutional dimensions. Eisenstadt v. Baird stated that "(i)f the right of privacy means anything, it is the right...to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear a child." 405 U.S. 438,453(1972). And, in Roe v. Wade, 410 U.S. 113 (1973), this Court held that the constitutional right to privacy "...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153. Accordingly, state action which impinges upon the exercise of reproductive rights must be justified by a compelling state interest which closely corresponds to the regulatory measure adopted. Doe v. Bolton, 410 U.S. 179 (1973).

49/ cont'd...
See also discussion in Sec. 1B, supra.

The right to choose whether or not to be sterilized, free from state interference, is a constitutionally protected right which flows from the right to privacy in making reproductive choices. Courts have recognized that the right to make personal decisions about sterilization is "...one of the basic civil rights of man." Skinner v. Oklahoma, supra, at 541.[50/]

Amici submit that the funding disparity which results from the Hyde Amendment's implementation and the government funding of sterilization is state action which impinges on a fundamental right and is not justified by a compelling state interest.

50/ See also Hathaway v. Worcester City Hospital, voiding on privacy grounds a statute which prohibited performance of sterilizations in a public hospital. The court reasoned that the statute impinged on a patient's right to choose sterilization. 475 F.2d 701 (1st Cir., 1973). Prohibition of sterilization, as well as compulsion, is proscribed.

D. No Compelling State Interest Justifies the Disparate Funding of Abortion and Sterilization.

Amici have demonstrated how the effects of the funding disparity between the Hyde Amendment restrictions on abortion and the federal policy of fully funding sterilizations impinges on poor and minority women's constitutional rights.

In Maher v. Roe, 432 U.S. 476 (1977) this Court recognized the legitimacy of a state's policy choice to encourage normal childbirth. Amici assert, however, that the government's continued funding of sterilizations under the family planning section of the Social Security Act belies the purported interest in encouraging childbirth.[51] First, it manifests a governmental intent to prevent childbirth. Secondly, it has the effect of

[51] Furthermore, the purpose in denying Medicaid funding for abortions is not to encourage childbirth, as the Congressional debates surrounding the DHEW funding bills clearly demonstrate. The record shows that the actual motive is opposition to abortion on moral grounds, a purpose which fails to satisfy the requirements of strict scrutiny and which conflicts with the Court's prior decision on abortion. See Roe v. Wade, supra. See also the explicit language in Cont'd.

forcing women who might want to give birth to children later to permanently terminate their childbearing capacity.

Poor women who are coerced into sterilization are deprived of their constitutional rights to privacy and equal protection under circumstances which have a proportionately greater impact on the reproductive rights of minority women.

A woman who forfeits her fertility in order to prevent or terminate an unwanted pregnancy is deprived of the freedom to procreate for the rest of her life. To exact such a price from women for their sexual activity, their poverty and their medical vulnerability is constitutionally impermissible.

[51] Cont'd...
the debate on the Resolution to Instruct Conferees on H.R. 7555 (The Hyde Amendment). 95 Cong. Rec. H 10131 (daily ed. Sept. 27, 1977).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

BARBARA ELLEN HANDSCHU
JANE BARRETT
MARILYNE MASON
DEBORAH WEIMER

NATIONAL LAWYERS GUILD
853 Broadway
New York, New York
*

Attorneys for Amici Curiae

* Counsel gratefully acknowledge the assistances of Mark Aguiar, a second year law student at New York University School of Law, Mayda Alsace, a second year law student at New York University School of Law, Janet Price, a second year law student at New York University School of Law, Steven Rosen, a second year student at New York University School of Law, Karen Stamm, a consultant on sterilization abuse.

Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1268

PATRICIA HARRIS, SECRETARY
OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

—v.—

CORA MCRAE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AMICI CURIAE
of
National Organiation for Women, Americans for Democratic Action, Coalition of Labor Union Women, National Abortion Rights Action League. National Council of Jewish Women, National Women's Political Caucus, New York City Coalition of Labor Union Women, Women's Action Alliance, Women's Equity Action League Educational and Legal Fund, Women's Legal Defense Fund, American Association of University Women, National Women's Political Caucus.

PHYLLIS N. SEGAL
JUDITH I. AVNER
NOW Legal Defense & Education Fund
36 West 44 Street
New York, New York 10036

JEAN MARSHALL CLARKE
425 14th Street N.W.
Washington D.C. 20004

LYNN MILLER
1055 Thomas Jefferson Street N.W.
Washington D.C. 20007

Attorneys for Amici

I N D E X

	Page
Table of Authorities.....	iv
Interest of Amici.....	1
Statement of the Case.....	3
Summary of Argument.....	5
Argument:	
I. The denial of Medicaid funding for medically necessary abortions intrudes on fundamental liberties of indigent women.....	10
A. When the government provides funds for childbirth and all medically necessary services but not for the alternative of medically necessary abortion, the proffered benefit impermissibly intrudes on indigent women's interest in their reproductive health.....	10
1. Denying Medicaid funding for medically necessary abortions has the intended effect of compelling indigent women to continue pregnancies injurious to their health.....	12
2. The denial of Medicaid assistance for medically necessary abortions im-	

Argument--Continued

Page

permissibly interferes with the woman's fundamental interest in health. 23

B. The denial of Medicaid funding for medically necessary abortions constitutes an unwarranted encroachment upon the constitutionally protected freedom to make choices surrounding the family and the home..... 28

C. The refusal to fund medically necessary abortions constitutes an unwarranted intrusion into the constitutionally protected realm of conscientious liberty..... 37

II. The plight of indigent women denied medically necessary abortions is exacerbated by the pervasive sex discrimination that impacts especially hard on women in poverty..... 44

A. Indigent women, the victims of the Hyde Amendment's restrictions on medically necessary abortions, are those most burdened by sex discrimination in employment..... 46

B. Indigent women, the victims of restrictions on medically necessary abortions and of sex discrimination in the

Argument--Continued

Page

labor force, are also those most burdened by sex discrimination in education and job training programs..... 57

III. The challenged statute does not withstand constitutional scrutiny..... 68

A. Strict scrutiny is required where, as here, the denial of Medicaid funding for medically necessary abortions impermissibly inhibits and penalizes the indigent woman who chooses to exercise her constitutionally protected right to terminate her pregnancy..... 68

B. Serving no legitimate interest whatsoever, the challenged restriction on Medicaid funding of medically necessary abortions fails both the strict scrutiny and minimum rationality tests..... 71

Conclusion..... 76

TABLE OF AUTHORITIES

Cases: Page

Beal v. Doe, 432 U.S. 438.....33

Budzinski v. Commonwealth of Pennsylvania Dep't of Public Welfare, No. 2349 C.D. (1977) 66

California Brewers Ass'n v. Bryant, 48 U.S.L.W. 4156 (1980).....55

Canterbury v. Spence, 464 F.2d 772 cert. denied, 409 U.S. 1064.....26

Carey v. Population Services International, 431 U.S. 678.....10,70

Colautti v. Franklin, 439 U.S. 379..... 15,23,25,74

Connecticut v. Menillo, 423 U.S. 9..23,25

Dandridge v. Williams, 379 U.S. 471....31

DeLaCruz v. Tormey, 582 F.2d 45, cert. denied, 99 S.Ct. 2416.....66

Doe v. Bolton, 410 U.S. 179.....15

Doe v. Percy, 476 F.Supp. 324.....25

Eisenstadt v. Baird, 405 U.S. 438...10,37

Frontiero v. Richardson, 411 U.S. 677.....70

Cases: Page

Griswold v. Connecticut, 381 U.S. 479.....10

Jacobson v. Massachusetts, 197 U.S. 11.....26

Loving v. Virginia, 388 U.S. 1.....36

Maher v. Roe, 432 U.S. 464.....9,13,14 16,43,72,74

McRae v. Harris, No. 76-C-1805 (E.D. N.Y. Jan. 15, 1980).....passim

Memorial Hospital v. Maricopa County, 415 U.S. 250.....72

Meyer v. Nebraska, 262 U.S. 390.....35

Moore v. East Cleveland, 431 U.S. 494.....35

Owens v. Brown, 455 F.Supp. 291.....65

Pierce v. Society of Sisters, 268 U.S. 510.....35

Planned Parenthood v. Danforth, 428 U.S. 52.....23,25,74

Reproductive Health Services v. Freeman, No. 79-1275 (8th Cir. 1980).....13,26,70

Roe v. Wade, 410 U.S. 113.....9,11,12 15,23,70,73,74

Cases: Page

Shapiro v. Thompson, 394 U.S. 618.....72

Sherbert v. Verner, 374 U.S. 398.....42

Singleton v. Wulff, 428 U.S. 106.....20

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816.....34,35

Stanley v. Illinois, 405 U.S. 645.....36

United States v. Kauten, 133 F.2d 703.....41

United States v. Seeger, 308 U.S. 163.....41

Welsh v. United States, 398 U.S. 333.....41

Williams v. Zbaraz, 99 S.Ct. 2095.....22,72,73

Women's Health Services, Inc. v. Maher, Civ. No. H-79-405 (D. Conn. Jan. 7, 1980).....28

Zablocki v. Redhail, 434 U.S. 374.....36

Zbaraz v. Quern, 469 F.Supp. 1212.....72

Constitution and Statutes:

United States Constitution:

First Amendment.....4,43

Constitution and Statutes: Page

United States Constitution:

Fifth Amendment.....4,43

Education Amendments of 1972: Title IX, 20 U.S.C. Section 1681 et seq.....58

Pregnancy Discrimination Act of 1978, 42 U.S.C. Section 2000e(k).....51

Social Security Act: Title XIX, Grants to States for Medical Assistance, 42 U.S.C. Section 1396....3,11

Vocational Education Act of 1963, as amended, 20 U.S.C. Sections 2301 and 2356.....58

Pub. Law 96-123, Section 109, Nov. 20, 1979, 93 Stat. 925.....4

29 U.S.C. Section 801 et seq.....62

42 U.S.C. Section 603 et seq.....48

Miscellaneous:

The Coming Decade: American Women and Human Resources Policies and Programs, 1979: Examination of Conditions and Opportunities Confronting American Women in Our Nation's Workplace: Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 861 (1979).....61,64

Miscellaneous: Page

Sex Discrimination and Sex Stereotyping in Vocational Education: Hearings Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 35 (1979).....60

Alan Guttmacher Institute, Abortions and the Poor: Private Morality, Public Responsibility 8 (1979).....19,72

Alan Guttmacher Institute, 11 Million Teenagers (1976).....16,33,56,59

American Friends Service Comm., Almost As Fairly (1977).....57

Ashford and Easton, The Extent and Effects of Discrimination Against Children in Rental Housing (Dec. 1979).....31

Benedek, "Parenting During the Life Cycle," Parenthood: Its Psychology and Psychopathology 185 (1970).....39

Brown, Freedman, Katz and Price, Women's Rights and the Law (1977).....40

Clark, The Law of Domestic Relations in the U.S. (1968).....40

Miscellaneous: Page

EEOC, Questions and Answers Concerning the Pregnancy Discrimination Act, 44 Fed. Reg. 23804-09 (1979).....51

Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers," 59 Boston U. L. Rev. 55 (1979).....53,54

Greene, Child Discrimination in Rental Housing (Nov. 1979).....31

Johnson, Carroll, Stanwick and Korenblit, Profile of Women Holding Office II, (1978).....70

Nat'l Academy of Sciences Institute of Medicine, Legalized Abortion and Public Health (1975).....21

Nat'l Comm'n on the Observance of International Women's Year, The Spirit of Houston (1978).....45,53,70

New York City Comm'n on the Status of Women, Women, Work & CETA (1977).....62,63

New York State Dep't of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey (1978)....33,34,59

Miscellaneous: Page

Osofsky and Osofsky, "Teenage Pregnancy, Psychosocial Considerations," 21 Clinical Obstetrics and Gynecology 1164 (1978).....39

Petitte and Cates, "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age," 67 Amer. J. of Public Health 860 (Sept., 1977).....20

Project on Equal Education Rights, Back-to-School Line-up: Where Girls and Women Stand in Education Today (1979).....57

Ryder, "Contraceptive Failure in the United States," 5 Family Planning Perspectives 133 (1973).....14

Stevens and Stevens, "Medicaid: Anatomy of a Dilemma," 35 Law and Contemporary Problems 348 (1970).....18

U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women (1978).....45,58

U.S. Comm'n on Civil Rights, Women Still in Poverty (1979).....passim

Miscellaneous: Page

U.S. Dep't of Commerce, Bureau of the Census, Divorce, Child Custody and Child Support (June, 1979).....40,65

U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 116, Money, Income and Poverty Status of Families and Persons in the U.S.: 1977 (Advance Report) (July, 1978).....50

U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1978 (Sept., 1978).....52

U.S. Dep't of Defense, America's Volunteers: A Report on the All-Volunteer Armed Forces (1978).....64

U.S. Dep't of Defense, Use of Women in the Military (2nd ed. 1978).....65

U.S. Dep't of Health, Education and Welfare, Center for Disease Control, Abortion Surveillance Annual Summary: 1977 (1979).....20

U.S. Dep't of Health, Education and Welfare, Compilation Base on Characteristics of State Plans for AFDC (April, 1978).....31

Miscellaneous: Page

U.S. Dep't of Health, Education and Welfare, Social Security and the Changing Roles of Men and Women (Feb., 1979).....55

U.S. Dep't of Housing and Urban Development, Women and Housing (June, 1975).....32

U.S. Dep't of Labor, Bureau of Labor Statistics, Employment in Perspective: Working Women (Report No. 544) (1978).....47

U.S. Dep't of Labor, Bureau of Labor Statistics, News: Trends in Weekly and Hourly Earnings for Major Labor Force Groups (Nov. 2, 1977).....47

U.S. Dep't of Labor, 1975 Handbook on Women Workers (1975).....45,47 53,55,58,60

U.S. Dep't of Labor, Working Mothers and Their Children (1977).....53

U.S. Social Security Administration, 40 Social Security Bulletin (Nov., 1977).....51

The Urban Institute, Women and Family Policy: Women in Federal Employment Programs (1979).....49,62,63

INTEREST OF AMICI

This brief is filed on behalf of the National Organization for Women, Americans for Democratic Action, American Association of University Women, Coalition of Labor Union Women, National Abortion Rights Action League, National Council of Jewish Women, National Women's Political Caucus, New York City Coalition of Labor Union Women, Women's Action Alliance, Women's Equity Action League Educational and Legal Fund, and the Women's Legal Defense Fund, with the written consent of the parties as provided in Rule 42 of this Court.

These organizations share a belief that every woman has a fundamental right to choose to terminate her pregnancy by abortion, guaranteed by her constitutional rights of privacy and religious freedom. Amici also share the conviction that the federal statute challenged in this case

impermissibly impinges upon the fundamental interest of all women in reproductive choice by effectively nullifying this constitutional right for indigent women. By excluding medically necessary abortions from an otherwise comprehensive health care program for the poor, the Hyde Amendment singles out and denies medical treatment to indigent women whose physicians have prescribed abortion as necessary to preserve and protect their health. The statute deliberately and purposefully denies poor women reproductive freedom, jeopardizing not only their health, but their lives, family stability, employment and education.

STATEMENT OF THE CASE

At issue in this case is whether the government can, consistent with our Constitution, subvert the reproductive choice of indigent women by denying them medically necessary care for health threatening pregnancies. The court below declared unconstitutional the challenged federal law, popularly known as the Hyde Amendment, which virtually eliminates federal funding for medically necessary abortions. The Hyde Amendment restricts the availability of assistance payments for medically necessary abortions under the "Medicaid" program established by the Title XIX of the Social Security Act, as amended, to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. §1396. Through this program, the federal government provides financial assistance for the medical care of needy individuals to states choosing to comply with the requirements of the federal statutory scheme.

First enacted as a rider to the 1977 fiscal year appropriation act for the Department of Health, Education and Welfare, the Hyde Amendment prohibits the expenditure of

federal Medicaid funds for abortions except in narrowly defined circumstances. The version of the Hyde Amendment in effect when the district court issued its opinion below allowed financial assistance for abortions only where the woman's life would be endangered if the pregnancy were carried to term, or the pregnant woman is the victim of reported rape or incest. Pub.L.No.96-123, §109,93 Stat. 925,926 (1979).

On January 15, 1980, the U.S. District Court for the Eastern District of New York held the challenged funding restriction unconstitutionally interferes with the pregnant woman's ability to terminate a health-threatening pregnancy, in violation of the First and Fifth Amendments, and enjoined enforcement of the Hyde Amendment. The United States government seeks a reversal of this judgment.

SUMMARY OF ARGUMENT

I

The Hyde Amendment singles out and eliminates almost all abortion procedures from services funded under an otherwise comprehensive program of health care benfits for the poor. The purpose and effect of this exclusionary funding scheme is to induce indigent women to carry unwanted pregnancies to term. The government succeeds in subverting the reproductive choice of indigent women and inducing them to continue pregnancies injurious to their health because the women lack feasible alternatives. This incursion into the health interest, recognized in the abortion context and more generally, impermissibly interferes with the indigent woman's core right to preserve her bodily integrity.

The indigent woman denied public funds to pay for a medically necessary abortion faces a range of grim alternatives, each of which has profound consequences for her existing family. In choosing to deny these funds, the government seeks to encourage the indigent woman with a health-

threatening pregnancy not only to bear additional children, but also to sacrifice her health and her family's well-being. In so doing the government intrudes on fundamental choices within the constitutionally protected sphere of family relationships in a manner contrary to deeply rooted traditions.

The Hyde Amendment unconstitutionally burdens a woman's conscientious decision to terminate a health-threatening pregnancy. Whether made in accordance with formal religious teachings or deeply held ethical and moral convictions, the decision is of conscientious magnitude and entitled to constitutional protection. To insist that a woman making this conscientious decision forego otherwise available medical benefits impermissibly invades a constitutionally protected realm.

II

Withholding government funds for health care from a pregnant indigent woman for whom abortion is medically necessary interferes with her ability to fully participate in our society. Her opportunities to

escape poverty through employment, education and job training, already limited because she is poor, are further restricted because she is a woman. Institutionalized sex discrimination in our society confines women to low-status, low-paying jobs, and to limited education and job training opportunities. The unequal opportunities open to poor women are evident in the general labor force, in federal job placement and job training programs, and in the military.

Denying the indigent woman the means to terminate a health-threatening pregnancy may impair her employment possibilities or preclude work entirely because of the health injury she suffers. If her health is restored, the lack of child care options in our society poses serious problems for the woman who must work for the economic survival of herself and her family. It also presents an obstacle to her educational and job training opportunities.

The sex bias that pervades educational institutions and job training programs reinforce the patterns of job segregation

and wage differentials found in the labor market. Coerced childbearing has a particularly devastating impact on the educational opportunities of teenagers. Having control over reproduction will not erase the many burdens faced by the indigent woman confronting poverty and sex bias. But by denying her the means to terminate a health-threatening pregnancy, the government has rendered illusory its efforts to combat these burdens.

III

Several interrelated factors require the Court to subject the challenged prohibition on funding medically necessary abortions to critical examination: the health damage inflicted on those making a disfavored reproductive choice; the privacy interest in decisions concerning reproductive and family matters; the liberty interest in making a conscientious decision to terminate a pregnancy for medical reasons; and finally, the powerless, disadvantaged and starkly defined--100% female and 100% poor--class of individuals affected by the prohibition. Taken singly, each of these factors compels critical review by

the Court. Together, they require that the Hyde Amendment be subjected to a strict standard of constitutional scrutiny.

No compelling or other state interest justifies the classification drawn by the Hyde Amendment. Fiscal interests are not only insufficient as a matter of law; they are illusory in fact. Nor does the challenged funding restriction protect maternal health. The only interest the Hyde Amendment arguably promotes is protection of potential life. Yet, as Roe v. Wade, 410 U.S.113 (1973), and its progeny make clear, this government interest is at no time great enough to outweigh the woman's interest in her health. The Court's decision in Maher v. Roe, 432 U.S.464 (1977), does not support a provision denying funds for medically necessary abortions. The Hyde Amendment serves no legitimate interest, let alone a compelling one. It cannot survive constitutional review.

ARGUMENT

I

THE DENIAL OF MEDICAID FUNDING FOR MEDICALLY NECESSARY ABORTIONS INTRUDES ON FUNDAMENTAL LIBERTIES OF INDIGENT WOMEN.

A. When the Government Provides Funds for Childbirth and All Medically Necessary Services But Not For the Alternative of Medically Necessary Abortion, the Proffered Benefit Impermissibly Intrudes on Indigent Women's Interest in Their Reproductive Health.

The right of every individual to be free from governmental interference in the exercise of personal procreative decisions has been long recognized as a fundamental liberty protected by the constitutional right of privacy. See, e.g., Carey v. Population Services International, 431 U.S.678 (1977); Eisenstadt v. Baird, 405 U.S.438 (1972); Griswold v. Connecticut, 381 U.S.479 (1965). The Court has articulated the principle that this constitutional right to privacy is "broad enough to encompass a woman's

decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S.113, 153 (1973).

The Hyde Amendment challenged in this case intrudes upon the exercise of this right. It singles out and eliminates virtually all abortion procedures from those services funded under an otherwise comprehensive program of health care benefits for the poor.[1/] The purpose and effect

---

1/ Title XIX of the Social Security Act, as amended, establishes the Medicaid program to "furnish medical assistance [to eligible persons] to meet the costs of necessary medical services." 42 U.S.C. §1396. States choosing to participate in this program must provide basic hospital and physician services for the "categorically needy," i.e., all persons eligible for welfare under federal categorical assistance programs. 42 U.S.C. §§1396a(a)(10), 1396a(a)(13)(C), 1396d(a). Participating states have the option of providing Medicaid payments to others who meet categorical requirements for federal assistance but are not eligible for welfare. The federal government has conceded that but for the adoption of the Hyde Amendment, participating states would be obligated to provide medically necessary abortions to Medicaid eligible persons. Brief for the United States at 43n.23, United States of America v. Zbaraz, No. 79-491.

of this exclusionary funding scheme is to induce indigent women to carry unwanted pregnancies to term. This restriction impermissibly subjects poor women to health-threatening and, at times, life-threatening risk.

1. Denying Medicaid funding for medically necessary abortions has the intended effect of compelling indigent women to continue pregnancies injurious to their health.

Once pregnant, a woman has two alternatives: to continue or terminate her pregnancy. The Court has recognized that the woman's fundamental interest in personal privacy protects this procreative choice. Roe v. Wade, 410 U.S.113 (1973). However, in reality, only those women able to pay the cost of their medical care can effectuate their constitutional right to choose between these two alternatives free from state interference.

As the Supreme Court recognized in Maher v. Roe, 432 U.S.464,474 (1977), by funding the childbirth alternative for the Medicaid-dependent woman and excluding the abortion alternative, the state deliberately influences the woman's reproductive choice. See Reproductive Health Services v. Freeman, F.2d , No. 79-1275, slip op. at 18-19 (8th Cir. 1980). Indeed, the federal government has acted to deny funds for almost all abortions precisely because it wishes to subvert the reproductive choice of women seeking to terminate their pregnancies.[2/] See McRae v. Harris, F.Supp. , No. 76C 1805, slip op. at 293,297 (E.D.N.Y. Jan. 15, 1980).

2/ In inducing women to continue their health-threatening pregnancies, the Hyde Amendment disregards the voluntary or involuntary nature of the intercourse that created the pregnancy, which itself can be a health-threatening factor. Where the pregnancy results from rape or incest, funding is limited to those cases which meet a strict and unrealistic sixty-day reporting requirement. See McRae v. Harris, slip op. at 151, 155, 157.

Similarly disregarded are the women who, determined to avoid pregnancy by the regular use of contraceptives, often prescribed by the physician

Like the provision before the Court in Maher v. Roe, 432 U.S.464 (1977), the denial of funding for medically necessary abortions undoubtedly will have its intended effect upon some indigent women: lacking feasible alternatives, they will be forced to continue their unwanted pregnancies. And, for some, the unwilling continuation of the

---

[footnote continued]
for health reasons, nevertheless become pregnant. No contraceptive is guaranteed--the failure rates range from 6% with the pill, and 12% with the I.U.D. to 33% with rhythm. Ryder, "Contraceptive Failure in the United States," 5 Family Planning Perspectives 133 (1973) (expressed as the percent failure among users over one year). The cumulative failure rate over a woman's childbearing years is of course much greater. Older women, often unaware of the duration of fertility beyond the onset of menopause, may also become pregnant unintentionally. Likewise, teenagers, ignorant of or misinformed as to the consequences of sexual intercourse or ignorant of or unable to obtain contraceptives, may fail to practice contraception regularly. For both of these groups health factors are especially important.

life-endangering pregnancy, despite the risks,[3/] will result in normal childbirth.

3/ All pregnancies pose health risks. These risks range from injury from falls occasioned by the unusual weight distribution of advancing pregnancy to death from hemorrhage, pulminary embolism and toxemia, among other causes. McRae v. Harris, slip op. at 93,94. In fact, the risk of death from childbirth is significantly greater than the risk of death from abortion. The Court in Roe v. Wade, 410 U.S.113 (1973), cited medical data as evidence that maternal mortality rates for early abortions "appear to be as low as or lower than the rates for normal childbirth" and concluded that in early abortion, maternal mortality in abortion may be less than mortality in normal childbirth. Id. at 149,163 (emphasis added). More recent statistics make clear that abortion is substantially safer than childbirth. McRae v. Harris, slip op. at 90. Mortality in childbirth for white women in 1974 was 10 per 100,000 live births; mortality in abortion was 0.5. For "black and other" women, mortality in childbirth was 35.1 per 100,000 live births; in abortion 2.4. Id.

Physicians nevertheless distinguish between pregnancies where abortion is medically indicated and those where it is not. The Court has shown reluctance to interfere in such medical judgments. Cf. Colautti v. Franklin, 439 U.S.379,401 (1979); Roe v. Wade, 410 U.S. at 166; Doe v. Bolton, 410 U.S.179,192 (1973).

However, unlike the situation in Maher,[4] it is clear that other women, unable to obtain abortions their physicians consider medically necessary to restore and preserve their physical and mental health, are certain to endure health-impairing pregnancies.[5]

---

[4] In Maher, the Court emphasized repeatedly that it was dealing with nontherapeutic abortions: "[W]e must decide whether the Constitution requires a participating state to pay for nontherapeutic abortions" 432 U.S. at 466 (emphasis added); "[The rationality test] requires that the distinction drawn between childbirth and nontherapeutic abortions...be 'rationally related' to a 'constitutionally permissible' purpose" Id. at 478 (emphasis added); "I do not read any decision of this Court as requiring a state to finance a nontherapeutic abortion." Id. at 481 (Burger, C.J., concurring) (emphasis added).

[5] The health problem is particularly acute for indigent pregnant teenagers who suffer from higher maternal mortality rates and are more likely to suffer health complications from pregnancy. See McRae v. Harris, slip op. at 137-38; Alan Guttmacher Institute, 11 Million Teenagers 23 (1976).

Thus, women will be subjected to conditions which, while falling short of the immediately life-threatening, will jeopardize their health.[6] In some cases, the health-threatening conditions will reach life-endangering proportions late in the pregnancy.[7]

In the case of medically necessary abortions, it is the state's failure to allocate funds no less than the woman's indigency which interferes with her right to terminate her pregnancy. The introduction of a massive system of federal funding has irrevocably altered the mechanisms by which this country provides health care for the poor. The government has now assumed the role previously played by other sources, such as charitable services,

---

[6] These conditions include cancer, myoma of the uterus, urinary tract infections, anemia, malnutrition, and obesity. McRae v. Harris, slip op. at 101-10. When there are preexisting conditions like diabetes, heart disease, chronic hypertension, various mental disorders, and a host of other common health problems, the physical stress of pregnancy increases the severity of the condition.

[7] McRae v. Harris, slip op. at 91-96.

which provided some medical care in the past but were certainly inadequate in light of the need for Medicaid. Such sources cannot now possibly fill the chasm created by the statutory exclusion of one service, abortion, from an otherwise comprehensive government health care program.[8/]

8/ As a result of the Medicaid program and its predecessors, both hospitals and physicians reduced their own private contributions to medical care for the indigent. See Stevens and Stevens, "Medicaid: Anatomy of A Dilemma," 35 Law & Contemporary Problems 348, 355n.24 (1970).

The irreversible nature of such trends is apparent from the experience of New York City in 1968 when cutbacks in the state Medicaid program went into effect:

> With the coming of Medicaid, much of the former private subsidy of welfare cases had been replaced by public subsidy; Medicaid had in large part eliminated "charity." The voluntary and proprietary hospitals and, for that matter, private practitioners in the health fields, were not prepared simply to revert to the preexisting situation. The voluntary hospitals, in particular, could not afford it. It was by then illegal, moreover, for welfare workers to press a recipient's relatives to contribute. There was no adequate resource to pick up the services and patients that Medicaid dropped. All in all, the medical care available to the many thousands of poor in New York City who were no longer eligible for assistance was worse in 1968 than it was before Medicaid was enacted.

Id. at 388.

For those women for whom the only source of medical care is Medicaid, access to abortion is either nonexistent or physically dangerous. By definition, Medicaid recipients are the poorest in the nation. Ninety percent of the Medicaid eligible women of reproductive age in the United States receive Aid to Families with Dependent Children (AFDC).[9/] The average monthly AFDC allocation for an entire family (usually a mother and two children) is $241;[10/] the average cost of an abortion in the United States is $285,[11/] some $44 more than the entire AFDC monthly allocation. The income level of indigent women is at that of subsistence; there is simply no money available to pay for an abortion. Where the physician cannot afford to work with no charge, and the woman cannot afford to pay, safe medical abortion is not

---

9/ Alan Guttmacher Institute, Abortions and The Poor: Private Morality, Public Responsibility 8 (1979).

10/ Id. at 27.

11/ Id.

a realistic alternative.[12] See Singleton v. Wulff, 428 U.S.106,118-19n.7 (1976).

Unable to raise the money for a legal abortion, some women will turn in desperation to less costly and less safe illegal abortions.[13] In 1977, for the first time since 1972, reported deaths due to illegal abortions increased.[14] Still other women will risk their lives by attempting one of

---

[12] Some indigent women will attempt to gather the resources necessary to pay for an abortion by sacrificing other life necessities--food, shelter, clothing. In their quest for funds to pay for an abortion, they will lose time, thereby increasing the risks from the abortion. The Center for Disease Control has documented the direct connection between the restriction of public funds and the delay in performance of abortion. U.S. Dep't of Health, Education and Welfare, Center for Disease Control, Abortion Surveillance Annual Summary 1977 1 (1979).

[13] Id. at 12-14.

[14] Id. at 1. See Petitti and Cates, "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age," 67 Am. J. Pub. Health, 860, 861 (1977).

the numerous dangerous methods to self-abort.[15] Still others, believing their options very narrow, will see sterilization as the only accessible means of birth control and will, therefore, "select" to be irreversibly sterilized.[16]

---

[15] "Among the non-medical procedures used for inducing abortion," according to the National Academy of Sciences Institute of Medicine, "are eating or drinking quinine or other drugs, introduction of chemicals into the vagina, and mechanical methods such as inserting blunt or sharp instruments into the uterus through the vagina. The drugs quite often lead to poisoning or vomiting so intense that it results in dehydration and eventual death unless fluid replacement compensates the loss. Inserting chemicals or instruments in the vagina or uterus can lead to: (1) infection; (2) injury to the membranes of the vagina; (3) perforation of the uterus with the possibility of injury to other organs in the abdominal area; (4) bleeding due to retained fetal or placental tissue; and (5) air embolism." National Academy of Sciences Institute of Medicine, Legalized Abortion and Public Health 64 (1975).

[16] Sterilization is a medical procedure that permanently ends an individual's reproductive capacity. Although a legitimate decision when arrived at voluntarily, amici submit that the withdrawal of funds for medically necessary abortions creates an inherently coercive situation for poor women seeking to limit the size of their families. Indigent women dependent on government funded health programs are particularly vulnerable to such coercion. See Brief for National Lawyers Guild et al., Amici Curiae.

Given the absence of feasible alternatives to continuing a health-threatening pregnancy, it is not surprising that the court below found that the Hyde Amendment's funding restrictions impermissibly jeopardize the health of indigent women. McRae v. Harris, slip op. at 307-15. Clearly, the effect of the Hyde standard is to "increase substantially maternal morbidity and mortality among indigent pregnant women." Williams v. Zbaraz, 99 S.Ct. 2095,2099 (1979) (quoting the district court opinion in Zbaraz).

2. The denial of Medicaid assistance for medically necessary abortions impermissibly interferes with the woman's fundamental interest in health.

Funding schemes designed to induce women to sacrifice their health in order to promote the state's purported interest in encouraging childbirth constitute an unwarranted incursion into the health interest recognized both in the abortion context and more generally. Roe v. Wade, 410 U.S. 113 (1973), and its progeny exhibit an overriding concern with the woman's health. Indeed, concern for the woman's health is a major consideration in these cases, taking primacy over potential life. See, e.g., Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975).

In Roe v. Wade, the Court catalogued a broad range of health detriments to the woman caused by restricting access to abortion, 410 U.S. at 153, and placed the "compelling point" for the state's maternal health

interest at the end of the first trimester expressly because early abortions are relatively safe and a woman's right to privacy is paramount. Id. at 163. A similar concern for the woman's welfare prompted the court in Roe to permit state regulation for the preservation of maternal health after the first trimester. Id. at 163. Moreover, the pregnant woman's health is the only factor that overrides the state's interest in protecting fetal life after viability. Id. at 164-65. At this time the state may regulate and even prohibit some abortions; however, even after viability this broad power is subordinated to the woman's interest in her health. Id. at 164-65. Thus, even in the last trimester of pregnancy when the woman's right to privacy has been ruled to be the weakest, the state may not restrict access to abortion in a manner dangerous to the woman's health.

The Court's holding that the woman's interest in health cannot be overridden even in the last trimester has been characterized by one district court as:

> So explicit and pointed ... that it cannot be ignored or discounted when the question is whether the woman's freedom of choice is to be considered fundamental in the context of less drastic, even mild forms of intrusion.

Doe v. Percy, 476 F.Supp. 324, 333 (W.D. Wis. 1979).

Nor has the Court retreated from its clear concern for the woman's health. For example, in Connecticut v. Menillo, 423 U.S. 9 (1975), predicating its decision on safeguards for the woman's health, the Court ruled that Connecticut could, during all trimesters of pregnancy, prosecute non-physicians who performed abortions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), Missouri's simple, straightforward informed consent requirement was upheld in view of its beneficial effect on the woman's mental health. Id. at 65-67. But at the same time the Court found Missouri's prohibition of saline abortion procedures unconstitutional because it forced the physician to use methods more dangerous to the woman's health. Id. at 78. And, in Colautti v. Franklin, 439 U.S. 379 (1979), the Court invalidated a criminal statute that failed to specify to whom the physician's

duty was paramount if a conflict arose -- the woman or the fetus.

The exclusion of medically necessary abortions from the Medicaid program constitutes not only an unwarranted interference with the overriding health interest of the woman recognized in the abortion context, it constitutes an impermissible interference with the woman's constitutional right "to seek to preserve one's health--without undue government influence." Reproductive Health Services v. Freeman, slip op. at 19 n.18. The right of "[e]very human being of adult years and sound mind...to determine what shall be done with his own body..." has been described as "fundamental in American jurisprudence." Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972), cert. den. 409 U.S. 1064 (1972).

Although certain interests may be overridden in the common good, the individual woman's right to preserve her bodily integrity represents a paramount interest with which the state lacks power to interfere. Thus, for example, in Jacobson v. Massachusetts, 197 U.S. 11 (1905), although upholding a

statutory vaccination requirement against a due process challenge, the Court made clear that judicial intervention is appropriate against vaccination, when, given the condition of a person's "health or body", vaccination would be "cruel and inhuman in the last degree." Id. at 39. Certainly indigent women confronting health-threatening pregnancies are in a condition of "health or body" where continuation of pregnancy would be "cruel and inhuman in the last degree." Judicial intervention is required to end the unwarranted intrusion into their bodily integrity resulting from the Medicaid funding restrictions challenged herein.

B. The Denial of Medicaid Funding for Medically Necessary Abortions Constitutes an Unwarranted Encroachment Upon the Constitutionally Protected Freedom to Make Choices Surrounding the Family and the Home.

The indigent woman denied the means to pay for a medically necessary abortion faces a range of grim alternatives, each of which has profound consequences for her life and her existing family. If she is to obtain a safe, legal abortion she must use the meager allowance available for her family's subsistence to pay for it.[17/] Already dangerously close to the margin, her family will thus be deprived of food, clothing or shelter.[18/]

Instead of subjecting her family to such immediate physical deprivation, the woman with a health condition her physician determines necessitates an abortion can turn to an illegal abortion -- one that is less costly,

---

17/ See p.20 n.12, supra.

18/ See Women's Health Services, Inc. v. Maher, Civ. No. H-79-405, slip op. at 13n.9 (D. Conn. Jan. 7, 1980). The district court noted that in some cases patients were driven to fraud (using a relative's insurance policy) or theft to obtain funds to pay for a therapeutic abortion. Id.

non-professional and life endangering; attempt to induce abortion herself; or continue her health-threatening pregnancy to term. Each of these alternatives poses serious threats to the welfare and stability of her family. The mental or physical incapacity resulting from a dangerous, illicit abortion or a disabling pregnancy may deprive her children of her parental care. If she dies, the trauma of parental loss may affect her children's well-being permanently. The deprivation resulting from incapacity or death is particularly severe when the Medicaid woman is the sole head of the household.

Short of the extreme results -- the woman's disability or death -- continuing the pregnancy may nonetheless impose other severe deprivations on an indigent family. The woman may be without the physical or emotional energy, or the financial resources, to support the expansion of the family. If, for example, she gives birth to a child with a birth or congenital defect who requires constant care, she will be forced to concentrate her energies on the care of the baby to the detriment of other children or family members. Her energies may be so drained by the birth and new child care

responsibilities that she will be unable to provide the emotional support needed by her other children and family members. She may be forced to give up employment, thereby further limiting the financial resources available to the family. Future employment and educational opportunities will be seriously restricted for her, placing additional stress on her family.

Withholding government funding for therapeutic abortions compounds the desperate situation the indigent woman dependent on welfare faces in attempting to provide adequate care for her family. Basic AFDC grants are often only a fraction of the minimum amount a state has determined is needed for a family to subsist.[19] Maximum grants mean finite resources

---

[19] Ohio for example, estimates the monthly basic needs for a family of four to be $431 but provides only $254. Georgia estimates the basic needs to be $246 but provides only $148. U.S. Comm'n on Civil Rights, Women Still in Poverty 46-47app. (July 1979).

available irrespective of family size.[20] Without control over family size, the entire family falls deeper and deeper into poverty with each additional member.

Housing presents a particular problem. Unless an indigent woman can plan additions to her family, she has no hope of surmounting monumental barriers to adequate housing.[21] Nationally, large housing units are in short

---

[20] See generally, Dandridge v. Williams, 397 U.S. 471 (1970). Alaska, Kentucky and Oklahoma limit AFDC benefits regardless of family size. The state of Washington allows smaller increments per person for additional family members beyond seven. U.S. Dep't of Health, Education and Welfare, Compilation Base on Characteristics of State Plans for AFDC 61-62 (April 1978).

[21] Discriminatory "no children" policies are being uncovered nationwide. A California survey of five cities revealed that children are excluded in the majority of rental housing in every studied city except San Francisco where a local ordinance prohibits "adult only" housing. Ashford and Easton, The Extent and Effects of Discrimination Against Children in Rental Housing 6 (1979). It has been suggested that "adult only" policies may represent a direct attempt to exclude female-headed households, the households "which because of their limited income levels are most in need of apartment accommodations." Greene, Child Discrimination in Rental Housing 19 (Nov. 1979).

supply. In public housing long waiting lists for such units are well-known.[22]

Further, ceilings on housing allotments[23] limit resources available for shelter without regard to family size and irrespective of actual cost. In light of the harsh realities, compelling an indigent woman to continue her health-threatening pregnancy to term virtually assures her inability to meet the housing needs of her family.

In addition to the privations imposed on her family, the woman denied access to an abortion her health requires is forced to bear a child who begins life at a disadvantage. These children generally experience a higher incidence of illness and hospitalization, do not do as well in school as children of like intelligence, and have difficulty making friends with their peers.

22/ See U.S. Dep't of Housing and Urban Development, Women and Housing 87-88 (June 1975).

23/ Few states provide AFDC recipients shelter allotments in accordance with what the recipient actually pays. Mississippi, for example, provides a monthly $50 shelter maximum for a family of four. U.S. Comm'n on Civil Rights, Women Still in Poverty 47 app. (July 1979).

See Beal v. Doe, 432 U.S. 438, 456 (1977) (J. Marshall, dissenting); McRae v. Harris, slip op. at 126.

Children cannot flourish without love and support. Unwanted pregnancy and childbirth have been linked with an increased risk of child abuse. Id. at 129. Although child abuse occurs throughout the income scale, the problem is particularly acute for those of lower socio-economic levels where the never-ending pressures of financial burdens, health problems, low salaries or unemployment can create a situation in which the caretaker just loses control Id. at 129.

The pressures confronting poor women forced to continue health-threatening pregnancies all too often result in the destruction of the family unit.[24] Unable to

---

24/ This is particularly true with teenage marriages, where there is a high probability of marital instability and divorce. See Alan Guttmacher Institute, 11 Million Teenagers 27 (1976); New York State Dep't of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (1978).

provide adequate care for her children, the woman may be forced to surrender them to foster care.[25] Once this surrender is made, it may be of long duration: the indigent woman attempting to obtain the return of her child often faces strenuous resistance from child welfare agencies that see the

---

[25] As this Court has already noted, "voluntary" foster care placements "occur when physical or mental illness, economic problems, or other family crises make it impossible for natural parents, particularly single parents, to provide a stable home life for their children for some limited period." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S.816,824 (1977). The Court also noted that according to experienced commentators, "typical parents in this situation might be...an unwed adolescent mother still too immature to rear a child, or a welfare mother confronted with hospitalization and therefore temporarily incapable of caring for her child." Id. at n.10. (citations omitted). See New York State Dep't of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (1978).

Adoption may not realistically exist as an option for teenagers. As the lower court found: "[i]nfants born to adolescents denied abortion are even less likely to be adopted because of their higher incidence of ill health and because minority infants are disproportionately represented among them." McRae v. Harris, slip op. at 146.

natural parents' poverty and lifestyle as prejudicial to the best interests of the child.[26]

In choosing to deny Medicaid funds for medically necessary abortions, the government seeks to encourage indigent women not only to bear children, but also to sacrifice their health and their family's well-being. In attempting to achieve such far-reaching consequences, the government invades a sphere of individual decision-making concerning home and family life which has enjoyed a long history of constitutional protection. For example, the government may not unnecessarily intrude on parents' educational decisions, Pierce v. Society of Sisters, 268 U.S.510 (1925); Meyer v. Nebraska, 262 U.S.390 (1923); dictate the composition of the nuclear family, Moore v. East Cleveland, 431 U.S.494 (1977) (plurality opinion); deprive parents of

---

[26] Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. at 835-36.

their children's love and companionship without due process of law, Stanley v. Illinois, 405 U.S.645 (1972); or unduly limit marriage, Zablocki v. Redhail, 434 U.S.374 (1978); Loving v. Virginia, 388 U.S.1 (1967).

In the instant case, moreover, by inducing health detriment the government has intruded on fundamental choices within this protected sphere of family relationships in a manner which is contrary to deeply rooted traditions. Cf. Zablocki v. Redhail, 434 U.S. at 396 (Powell, J. concurring). Its action in singling out and refusing to fund this one medically necessary procedure is therefore impermissible and cannot be allowed to stand.

C. The Refusal to Fund Medically Necessary Abortions Constitutes an Unwarranted Intrusion Into the Constitutionally Protected Realm of Conscientious Liberty.

In exercising the awesome responsibility inherent in questions "so fundamentally affecting a person as the decision whether to bear or beget a child," Eisenstadt v. Baird, 405 U.S. 438,453 (1972), an indigent woman confronted with a health or life-threatening pregnancy faces a decision of religious magnitude. It is by necessity a decision of conscience or conviction whether or not its answer is guided by explicit religious teachings or by deeply held moral and ethical beliefs.

For some women, a conscientious decision guided by denominational teachings will require termination of the pregnancy.[27/]

[27/] Thus, for example, "in the Conservative and Reform Jewish teaching...the mother's welfare must always be the primary concern in pregnancy, the fetus is not a person, and...abortion is mandated to preserve the pregnant woman's health." McRae v. Harris, slip op. at 326-27.

Other denominations, without requiring abortion, recognize circumstances justifying abortion and call upon the woman to make a responsible personal decision.[28/]

Moreover, women who confront the procreative choice without formal religious teachings must nevertheless decide whether, particularly considering the threatened impairment of their health, they can in good conscience carry the unwanted pregnancy to term. The decision to become a parent is a difficult and awesome one, of conscientious dimension, in part because of the emotional and practical consequences of parenthood. The ties that bind the parent to the child, though not susceptible to easy description, "end only

---

28/ For example, the American Baptist Church would consider "danger to the physical or mental health of the woman, evidence that the conceptus has a physical or mental defect, and conception in rape, incest or other felony as justifying abortion," McRae v. Harris, slip op. at 327. The United Methodist Church affirms the principle of responsible parenthood and recognizes threats posed by the pregnancy to the health of the woman and her family, and even the mental capability of the child, to be reasons for discontinuing the pregnancy. Id.

with the death of the parent."[29/]

The practical consequences of parenthood are equally profound, affecting not only the newborn; but also, as we have seen, the very survival of the existing family unit.[30/] Society merely confirms and reinforces the parent's own conscientious sense of responsibility by imposing on parents the legal

---

29/ Benedek, "Parenting During the Life Cycle," in Parenthood: Its Psychology and Psychopathology 185 (Anthony and T. Benedek eds. 1970). Perhaps for this reason, the McRae court found "[a]doption, even if there were enough potential adopting parents, does not represent a humanly available alternative," even for adolescent mothers. McRae v. Harris, slip op. at 144-45.

The impact of parenthood is so great that at times it may even sever crucial emotional ties. A recent study found: "Although a small number of prospective grandparents accept the pregnancy easily, most do not. Initially anger appears to be the most common parental response. This anger may be strong enough that the daughter feels the necessity to leave her home." Osofsky and Osofsky, "Teenage Pregnancy, Psychosocial Considerations," 21 Clinical Obstetrics & Gynecology 1164-65 (1978).

30/ See Part IB supra.

obligation to support their children,[31] and by subjecting them to criminal-type proceedings for neglect of their parental duties.[32]

Given the devastating life-long implications of forced child-bearing, pregnancy presents the indigent woman with profound questions of life and death. Whether

---

31/ See H. Clark, Domestic Relations 187-88 (1968); B. Brown, A. Freedman, H. Katz and A. Price, Women's Rights and the Law 145-56 (1977). As a practical matter, where parents are not living together, this obligation falls primarily on women. A United States Bureau of the Census study of women receiving child support showed that a large majority of divorced and separated women with children under 18 received no child support in 1975. Specifically, among such women who were divorced and had not remarried, 58% received no child support. Among remarried divorced women with children under 18 from their previous marriage, 74% received no child support. Among currently separated married women with children under 18, 82% received no child support. Among the never married mothers, 96% received no child support. Among all such mothers who received child support payments, 54.4% received less than $1500 per year for an average of two children. Roughly 31.7% of all the women receiving child support need public assistance. U.S. Dep't of Commerce, Bureau of the Census, Divorce, Child Custody and Child Support Table 8, p. 14 (June 1979).

32/ See H. Clark, Domestic Relations 200 (1968).

or not considered in the context of formal religious teachings, these questions are answered "disregarding elementary self-interest...in response to an inward mentor." United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).[33] The decision whether or not to bring a child into the world is one which by definition involves the exercise of conscience. Certainly for a woman with a health-threatening pregnancy, her conscience or convictions may make abortion the only acceptable form of treatment.

33/ The need to afford theists and non-theists equal protection for their respective beliefs and to avoid unconstitutionality prompted the Court to construe the statutory military service exemption broadly to include "all those whose conscience, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become the instrument of war," Welsh v. United States, 398 U.S. 333, 344 (1970). So too the need to afford an equal value to all faiths, and to decisions of conscience reached without guidance from formal religion, requires recognition of a broad right of conscience in regard to decisions affecting childbirth and abortion. See United States v. Seeger, 380 U.S. 163, 176 (1965).

Decisions in regard to abortion and childbirth are thus of conscientious and religious dimensions partaking of the realm of liberty protected by the First and Fourteenth Amendments. In the words of the district court below,

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely a part of the liberty protected by [the due process clause], doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment.

McRae v. Harris, slip op. at 328.

Legislative provisions like that challenged here which intervene in such protected decisions cannot stand consistent with our constitutional scheme. In the absence of a compelling state interest, funding programs that force a woman to choose between either following her conscientious decision, thereby forfeiting benefits, or abandoning her conscientious choice so as to obtain the benefits, impermissibly burden constitutional liberties. See Sherbert v. Verner, 374 U.S. 398, 403-04 (1963). When religious freedoms

are at stake, it makes no difference that the burden may be characterized as indirect.[34/]

For these reasons, amici urge this Court to hold, as did the district court below, that to deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision. McRae v. Harris, slip op. at 328.

34/ While the Court found in Maher v. Roe that the burden imposed by Medicaid restrictions on the funding of elective abortions was "indirect" and therefore not "undue" in the Fourteenth Amendment sense, the Court implicitly acknowledged that such burdens may be unconstitutional when First Amendment interests are at stake. 432 U.S. at 474-75 n.8.

II

THE PLIGHT OF INDIGENT WOMEN DENIED MEDICALLY NECESSARY ABORTIONS IS EXACERBATED BY THE PERVASIVE SEX DISCRIMINATION THAT IMPACTS ESPECIALLY HARD ON WOMEN IN POVERTY.

For the poor, the fundamental guarantee of reproductive rights is particularly critical. Their life situation may make the choice whether or not to have a child effectively determine whether poverty will continue unabated, whether a family will remain intact, whether they as individuals will even survive and ever hope to prosper.

Withholding government funds for medical care from the indigent woman who is pregnant and in need of an abortion to preserve her health interferes with her ability to fully participate in our society. By definition, she is dependent upon the Medicaid program because she is poor. Her opportunities to escape poverty through employment, education and job training are severely limited because of her poverty.

But the obstacles the indigent woman faces in the labor market and in seeking education and job training are not limited to those known by all poor people. They are compounded by those obstacles common to all women: the persistent, sex-based discrimination that still confines women to low-status, low-paying jobs, and to limited job training and education opportunities.[35/] For the indigent woman, the opportunities are fewer still.[36/] Her chances for these necessities, already limited because she is female, and further limited because she is poor, are virtually eliminated when she is denied the right to control her reproductive life and maintain control over her health.

35/ See generally, National Comm'n on the Observance of International Women's Year, The Spirit of Houston at 34-37, 42-48 (1978); U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women (1978); U.S. Dep't of Labor, 1975 Handbook on Women Workers (1975) [hereinafter cited as Handbook on Women Workers].

36/ See, e.g., U.S. Comm'n on Civil Rights, Women Still in Poverty (1979) [hereinafter cited as Women in Poverty].

A. Indigent Women, The Victims of The Hyde Amendment's Restrictions on Medically Necessary Abortions, Are Those Most Burdened by Sex Discrimination in Employment.

Employment opportunities and pay for indigent women continue to reflect the sex discrimination that has permeated our society. Occupational segregation and the wage gap between men and women are especially severe in employment situations most likely to be accessible to the poor. Where indigent women are able to secure employment, they face the high probability of being concentrated in low-skilled, low-paying, dead-end jobs.

Employed women are concentrated in a very limited number of occupations;[37] these are invariably the lowest paying occupations of all.[38] Even in the most gender-segregated

---

37/ In 1973, more than two-fifths of all employed women were concentrated in only 10 occupations--secretary, retail trade salesworker, bookkeeper, private household worker, elementary school teacher, waitress, typist, cashier, sewer and stitcher and registered nurse. About three-fourths of all employed women were in only 57 occupations; in more than half of these, 75 percent or more of the employees were women. Handbook on Women Workers at 91-92. There is evidence that the occupational segregation of women is increasing. For example, in June 1978, 79 percent of all clerical workers were women, as compared to 62 percent in 1950. U.S. Dep't of Labor, Bureau of Labor Statistics, Employment in Perspective: Working Women (Report No. 544, 1978).

38/ The 1977 weekly wage for the job categories listed in note 37 supra, except elementary school teacher and registered nurse, ranged from $59 for private household workers to a high of $171 for sewers and stitchers. U.S. Dep't of Labor, Bureau of Labor Statistics, News: Trends in Weekly and Hourly Earnings For Major Labor Force Groups Tables 1-3 (Nov. 2, 1977). In contrast, the 1977 average weekly wage for male dominated jobs such as construction ($297), transportation and public utilities ($278), and motor vehicle retailers ($208) was far better. Women in Poverty at 19.

occupations where women are ghettoized, the few men employed receive higher wages.[39/]

The unequal opportunities open to poor men and women are evident from the experience under the federal Work Incentive Program ("WIN"),[40/] established to create job placement and training for welfare recipients. Summarizing hearing testimony on the WIN program, the U.S. Commission on Civil Rights reported:

39/ On the average, in 1977 women clerical workers had a median income of $5,365 less than male clerical workers; retail trade saleswoman earned $5,581 less than retail trade salesmen; and female food service workers earned $2,077 less than male food service workers. Id.

40/ 42 U.S.C.§630, et. seq. WIN is the only federal employment program specifically targeted at recipients of Aid to Families With Dependent Children (AFDC). About 75 percent of WIN registrants are women. Women in Poverty at 14.

> Officials of the WIN program who need to make immediate job placements for welfare recipients gave dramatic evidence of the difference in opportunities for women. Women who have no skills and a low educational level have to take jobs as assemblers or packers at minimum wage levels if they want to become employed at once. A man with equally little experience can get a general labor job that pays more.[41/]

The statistics bear this out. In 1976, women who obtained employment through WIN were paid an average hourly wage of $2.57; the average hourly wage for men was $3.50.[42/] Further, although 75 percent of WIN registrants are women, many of whom have sole or major responsibilities for their families, the program has a legislative priority for the placement of unemployed fathers.[43/]

41/ Women in Poverty at 19.

42/ The Urban Institute, Women and Family Policy: Women in Federal Employment Programs 16-17 (January 1979); see Women in Poverty at 14-15.

43/ 42. U.S.C.§633(a): see Women in Poverty at 2,14.

These statistics reflect the reality for poor women and their dismal prospects of escaping poverty. Those who do secure employment are likely to be locked into sex-segregated, low-paying jobs that in too many cases mean they remain in poverty and dependent on Medicaid for medical care. Thus, in 1977, close to 36 percent of all women over the age of fourteen in poverty were employed; 14 percent were employed full-time.[44/] Yet employment failed to extract these women from poverty and dependence on government-funded medical care.

Denying an indigent woman the means to have a medically necessary abortion may preclude employment during the length of a health-threatening pregnancy and during recovery. Her employment possibilities may even be permanently impaired by damage to her health as a result of pregnancy or the permanent burden of care for a child with birth or congenital defects.

44/ U.S. Dep't of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 116, Money, Income and Poverty Status of Families and Persons in U.S. 1977, Table 10, 16-17 (Advance Report) (July 1978).

Although discrimination against employed women who become pregnant has been rendered illegal by the Pregnancy Discrimination Act,[45/] the benefit of this amendment to Title VII is not reaped by women whose employers do not offer employee benefits such as health care coverage, sick leave and disability insurance. Title VII prohibits discrimination based on pregnancy; it does not require the creation of employee benefit plans.[46/] In 1975, less than 48 percent of all employees were covered by temporary disability insurance; health benefit plans for hospitalization covered only 72 percent of all employees; and regular medical coverage was available to less than 70 percent.[47/] Indigent women who are more likely to be employed part-time or in occupations such as private household worker, waitress or farm

---

45/ Pregnancy Discrimination Act of 1978, Pub.L.No. 95-555, 42 U.S.C. §2000e(k).

46/ See Equal Employment Opportunity Comm'n (EEOC) Questions & Answers Concerning the Pregnancy Discrimination Act, 44 Fed. Reg. 23804-09 (1979) (to be appended to 29 C.F.R. Part 1604).

47/ U.S. Social Security Administration, 40 Social Security Bulletin 20,22 (Nov. 1977).

worker, are least likely to have access to these employee benefits, let alone a realistic and timely remedy to combat employment discrimination on the basis of pregnancy.[48/]

Should a woman's health be restored after a problem pregnancy, the lack of child care in our society poses a special problem. This problem confronts all parents who seek employment, but impacts especially hard on women, and particularly the 2,279,000 indigent women who head families.[49/] At times the responsibilities attending single parenthood preclude employment as a matter of explicit employer policy.[50/]

48/ Government remedies for sex discrimination in employment are illusory for many women in poverty who cannot afford financially to lose hard-gained employment nor practically the time to effect a challenge and remedy.

49/ U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States, 1978 471 (September 1978).

50/ Since 1974, the Army's regulations have forbidden the enlistment of sole parents with custody of children under 18. Army Regulation 601-210.

Where employment is not precluded, parents must have some responsible child care arrangements while they are absent from the home. Yet, as the National Commission on the Observance of International Women's Year has found, "for most working parents, child care is makeshift, internal, unavailable or prohibitively expensive."[51/] Government agencies recognize that "there is still a great lag between the need and supply of good child care facilities, whether in a center or in a family home."[52/] In two-parent families, where the responsibility for care of children traditionally has been assigned to the mother,[53/] as well as in single parent families headed by women,

---

51/ Nat'l Comm'n on the Observance of International Women's Year, The Spirit of Houston 27 (1978).

52/ Handbook on Women Workers at 40. In 1975 there were over 16 million children 3 to 13 years old with working mothers, but only 1.7% were enrolled in group care centers. U.S. Department of Labor, Working Mothers and Their Children 11 (1977).

53/ Women in Poverty at 30; Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers," 59 Boston University Law Review 55, 56-57 & n.16 (1979).

the lack of child care options circumscribes employment opportunities for women with children.[54/]

Approximately one-third of all employed mothers accommodate childrearing responsibilities and economic survival through part-time work.[55/] However, the flexibility for family duties that comes with part-time work is not without a price: part-time employment "requires workers...to sacrifice normal employment expectations in exchange for less time on the job."[56/] Thus, part-time work is dramatically underpaid in comparison with full-time employment; and it is characterized by inadequate fringe benefits, opportunities for promotion, job stability, or salary increases.[57/]

54/ See Women in Poverty at 30-45. Child care is a central concern for women in deciding whether to work, which hours and where.

55/ Frug, "Securing Job Equality for Women: Labor Market Hostility to Working Mothers," 59 Boston Rev., supra at 57.

56/ Id.

57/ Id.

Even where the multiple responsibilities of employment and childrearing have been accommodated, another pregnancy--particularly when health-threatening--may make the situation totally untenable. Where the woman is forced to leave the workforce, despite economic need, the interruption in her job development may result in long-term problems. In addition to the significant dampening effect on wages,[58/] the interruption of employment has a number of adverse consequences, including ineligibility for seniority and its concomitant job security and mobility opportunities,[59/] and reduced social security benefits.[60/]

58/ See Handbook on Women Workers at 125.

59/ Id.; cf. California Brewers Ass'n v. Bryant, 48 U.S.L.W. 4156 (1980).

60/ See U.S. Dep't of Health, Education and Welfare, Social Security and the Changing Roles of Men and Women, 10, 20-22 (February 1979).

For untold numbers of indigent women, the denial of funding for medically necessary abortions will compound their poverty[61] and exacerbate the impact of sex discrimination. Having control over reproduction will not erase the many burdens faced by the indigent woman confronting poverty and sex discrimination in the labor market. But by denying her the means to terminate a health-threatening pregnancy, the government has rendered illusory its efforts to combat these burdens.

61/ For pregnant teenagers, the denial of abortion may assure poverty and dependence on government aid. Seventy-two percent of the women who first gave birth at ages 15-17, and 41 percent of those who gave birth at 18 or 19, were receiving public assistance. Alan Guttmacher Institute, 11 Million Teenagers 26 (1976).

B. Indigent Women, The Victims of Restrictions on Medically Necessary Abortions and of Sex Discrimination In the Labor Force, Are Also Those Most Burdened By Sex Discrimination In Education and Job Training Programs.

Education and job training programs aimed at alleviating the employment problems of the poor are potentially among the most powerful tools available for improving the employment and economic status of women. Yet there is clear indication that sex bias persists in our educational institutions[62] and that job training programs replicate and reinforce the patterns of occupational segregation and wage differentials found in the labor market.[63]

Education and job training opportunities are not equally available to women, and

62/ See, e.g., American Friends Service Comm., Almost As Fairly (1977); Project on Equal Education Rights, Back-to-School Line-Up: Where Girls and Women Stand in Education Today (1979).

63/ See generally, Women in Poverty at 14-39.

particularly to poor women, despite legislative action[64/] to assure gender-based equality in education. Women have not yet achieved educational parity with men[65/] and consequently are robbed of the benefits education brings. The obstacles to women's educational attainment posed by childbearing and rearing responsibilities are reflected in school enrollment rates: during their childbearing years, enrollment rates for women fall below those of men.[66/]

Coerced childbearing has a particularly harsh and far reaching impact on the educational opportunities of teenagers. According to testimony received by the court below, "eight-tenths of the women who become

64/ See e.g., Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 et. seq.; Vocational Education Act as Amended in 1976, 20 U.S.C. §§2301, 2356.

65/ U.S. Comm'n on Civil Rights, Social Indicators of Equality for Minorities and Women 16 (1978).

66/ At age 16, school enrollment rates for women approximately equal those of men; in the 22 to 24 year bracket, their enrollment rate is only slightly over half that of comparably aged men, a differential that remains steady through the 30 to 34 year bracket. Handbook on Women Workers at 195.

mothers at seventeen or younger drop out of school, and alternative educational programs for such young mothers are provided by only about one-third of the states."[67/] Pregnancy is the reason most often cited by female teenagers for dropping out of school.[68/] Rather than providing emotional support and encouragement for the pregnant teenager to continue her education during pregnancy and return after the birth of her child, teachers and counselors still actively "encourage" pregnant teenagers and teenage mothers to leave school.[69/] The resulting low-level of educational attainment has a direct bearing upon employment and, therefore, economic independence.[70/]

Those females who do not drop out are generally "encouraged by the schools to prepare solely for the role of homemaker or for dead-end low-paying jobs in traditionally

67/ McRae v. Harris, slip op. at 147.

68/ Alan Guttmacher Institute, 11 Million Teenagers 25 (1976).

69/ Id.; see also McRae v. Harris, slip op. at 147.

70/ See New York State Department of Social Services, Teenage Pregnancy in New York State: A Report to Governor Hugh L. Carey 4 (July 1978).

female occupations."[71/] The vocational education system presents dramatic evidence of the way education channels women into low-status, low-paying jobs. While 55 percent of the vocational education enrollees in 1972 were girls and women, less than 2% of those enrollees were being trained for other than traditional female occupations.[72/]

Apprenticeship programs are an important potential source of training for employment, particularly those aimed at aiding the disadvantaged achieve economic independence. Historically, women did not even apply to such programs because sex-biased high school curricula did not encourage girls to think

---

71/ Steiger, "Vocational Preparation for Women: A Critical Analysis" reprinted in Sex Discrimination and Sex Stereotyping in Vocational Education: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 35 (1975) [hereinafter Hearings]; see Steele, Women in Vocational Education, reprinted in Hearings 285-337.

72/ Handbook on Women Workers at 214-15. Over 49% of the females enrolled in vocational education courses in 1972 were studying home economics. The rest were concentrated in training and education aimed at traditionally female, low-paying occupations such as clerical, retail sales, cosmetology, and health aids. Id.

of careers in skilled crafts.[73/] When they applied, they often were not accepted.[74/] Although women are now applying to apprenticeship programs in increasing numbers, their participation rate is still appallingly low.[75/]

Since women represent three-fourths of all persons receiving public assistance and welfare payments,[76/] government training programs aimed at helping the poor should have a significant positive impact on women. The reality is otherwise -- men receive

---

73/ Women in Poverty at 21.

74/ Id.

75/ Women were only 2.2 percent of the participants in apprenticeship programs overseen by the United States Department of Labor in 1977. The Coming Decade: American Women and Human Resources Policies and Programs, 1979: Examination of Conditions and Opportunities Confronting American Women in Our Nation's Workplace: Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 861 (1979) (testimony of Robert J. McConnon, Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, U.S. Dep't of Labor).

76/ Women in Poverty at 1.

preferred placement in the programs[77/] and women are consistently underrepresented.[78/]

One major federal job training and employment program, The Comprehensive Education and Training Program (CETA),[79/] has been described as potentially an "important means for bringing women into the labor force on an equal basis with men."[80/] Unfortunately, the indications are that CETA

77/ See p. 48 supra., discussing the federal Work Incentive Program. Although the current emphasis of WIN is on immediate job placement, it was initially established to promote job training and counselling as well. Women in Poverty at 14.

78/ While women comprised 46 percent of the unemployed population in the 1970's, only 43 percent of those in federal employment and training programs were women. This figure, however, is inflated by the high percentage of women receiving AFDC benefits who are required to register for WIN. The Urban Institute, Women and Family Policy: Women in Federal Employment Programs (1979).

79/ 29 U.S.C. §801 et. seq.

80/ New York City Comm'n on the Status of Women, Women, Work and CETA (remarks of Alexis M. Herman, Director, Women's Bureau, U.S. Dep't of Labor) 10 (1977).

is not serving the interests of women effectively.[81/] For example, in 1976 women represented only 28 percent of those enrolled in CETA's Title IV Jobs Corps projects, 32 percent in Title II, and 35 percent in Title VI programs.[82/] A recent survey of the 445 prime sponsors in CETA revealed only 82 projects targeted for women.[83/] Many of the women who do receive placements in CETA are trained in programs that follow the sex-segregated patterns found in the work force at large.[84/] These programs are not helping women learn the job skills needed to break out of the traditionally low-paying jobs females usually occupy in our society. Even in jobs obtained through CETA, women are likely to

81/ Id.

82/ The Urban Institute, Women and Family Policy: Women in Federal Employment Programs, supra, at 9.

83/ New York City Comm'n on the Status of Women, Women, Work and CETA, supra, at 10-11 (remarks of Alexis M. Herman, Director, Women's Bureau, U.S. Dep't of Labor). Of these, 30 projects were funded from the Secretary of Labor's Title III Discretionary Monies, a one-time only bonus grant program.

84/ Id. at 26 (based on a New York City survey).

receive lower wages than men doing the same job.[85/]

Even the military, traditionally viewed as a route out of poverty and currently advertised as a means of gaining valuable work experience and training, provides little opportunity for women. In 1977, women constituted only 5.8 percent of the armed forces on active duty.[86/] As in the general labor force, these women were concentrated in traditionally female occupations.[87/] Furthermore, less than 27 percent

---

85/ Fifty percent of all women who obtain jobs through the CETA Public Service Component are placed in clerical positions; they receive 57 cents less per hour than men employed through CETA in clerical positions. The Coming Decade: American Women and Human Resources Policies and Programs, 1979: Examination of Conditions and Opportunities Confronting American Women in Our Nation's Workplace: Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 730 (testimony of Hon. Mary F. Berry, Asst. Sec'y of Education, U.S. Dep't of Health, Education and Welfare) (1979).

86/ U.S. Dep't of Defense, America's Volunteers: A Report on the All-Volunteer Armed Forces 71 (1978).

87/ For example, 33 percent were in clerical and administrative positions and less than 2 percent were in electrical/mechanical repair jobs. Id.

of all 1977 authorized positions in the military were open to female enlistees.[88/] Yet another serious obstacle to women in the armed forces is the requirement in some branches that single parents forfeit custody of their children as a precondition to enlistment.[89/] The effect of the pervasive sex-bias in the military is to deprive women of the training and experience that would help them obtain skilled jobs in the civilian work force,[90/] and to perpetuate their confinement to low-paying, low-skilled occupations.

88/ See U.S. Dep't of Defense, Use of Women in the Military 32,38,41,44 (2d. ed. 1978) (from data submitted by the Army, Navy, Air Force and Marines on positions authorized for "End FY 1977").

89/ See Army Regulation 601-210. The impact of this requirement is most devastating on women because of the significantly larger number of women as compared to men with custody of their children. See U.S. Dep't of Commerce, Bureau of the Census, Divorce, Child Custody and Child Support Table 6, p. 11 (June 1979) (showing over five million single parent families maintained by females in 1978, compared to less than 550,000 maintained by males).

90/ See Owens v. Brown, 455 F.Supp. 291,295 (D.D.C. 1978).

The lack of realistic child care options that plagues women in the employment context also disadvantages women seeking to escape poverty through education and job training. Indeed, the obstacles may be even greater here, for unlike gainful employment, studying produces no immediate income. Welfare departments may refuse to grant recipients the child care allotments necessary to permit them to study.[91/] And it is uncertain whether schools will be held to have any obligation to provide child care facilities for the children of students.[92/]

91/ See, e.g., Budzinski v. Commonwealth of Pennsylvania, Dep't of Public Welfare, No. 2349 C.D. [1977] 2 Pov. L. Rep. (CCH) ¶27,412 (Pa. Commonwealth Ct. 1978) (denying eligibility for a child care allowance to an AFDC recipient taking a training course in mathematics, where she had already completed an approved course in stenography).

92/ See De LaCruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), cert. denied, 99 S.Ct. 2416 (1979) (finding plaintiffs alleging lack of day care facilities at a community college state a cause of action under both Title IX and the Fourteenth Amendment, but failing to reach the merits).

The pervasive sex discrimination in education and job training programs, particularly those specifically aimed at helping the poor achieve economic independence, serves to reinforce the indigent woman's poverty. This condition deepens when she is denied basic control over her reproductive health and life. Deprived of the ability to determine and plan the size of her family and to obtain necessary health care, she is virtually assured that education and job training opportunities -- theoretically available to all without gender bias, but in reality already limited for women -- will be closed to her.

III

THE CHALLENGED STATUTE DOES NOT WITHSTAND CONSTITUTIONAL SCRUTINY.

A. Strict Scrutiny Is Required Where, As Here, the Denial of Medicaid Funding for Medically Necessary Abortions Impermissibly Inhibits and Penalizes the Indigent Woman Who Chooses to Exercise Her Constitutionally Protected Right to Terminate Her Pregnancy.

Several interrelated factors require the Court to subject to critical examination the challenged statutory classification prohibiting funding for medically necessary abortions. First, as discussed above in Part IA, this measure intentionally singles out one class of individuals--indigent women in need of medically necessary abortions--and deprives only this class of the means to obtain necessary health care. The challenged classification invidiously discriminates against these indigent women by seeking to inflict health damage on those choosing to exercise their constitutionally protected right to terminate their pregnancy by abortion.

Second, as shown in Part IB, the denial of medical care for health-threatening pregnancies impermissibly interferes with an indigent woman's fundamental right to privacy in decisions concerning reproductive and family matters.

Third, as shown in Part IC, this restrictive funding measure deprives women of the constitutionally recognized liberty to make a conscientious decision to terminate a pregnancy for medical reasons. McRae v. Harris, slip op. at 327-28.

Finally, the funding measure impacts upon a class of individuals that is starkly defined: it is 100% female and 100% poor. The Hyde Amendment denies access to necessary health care to women for whom dependency on Medicaid is a brutal fact of life. In doing this, it heaps additional burdens on indigent women already denied equal access to education, job training and employment opportunities, as discussed above in Part II. The government's classification in Hyde imposes this harsh treatment upon those without the power to have their voices heard by a legislature dominated by men who are

not themselves dependent on government health care programs.[93/] See Reproductive Health Services v. Freeman, slip op. at 29-30.

Taken singly, each of these factors is sufficient to compel critical review by the Court. Taken together, such deliberate governmental intrusion into the constitutionally protected realm of the woman's private conscientious decision to terminate her pregnancy, coupled with the detrimental health consequences central to this case, requires a strict standard of constitutional review. See, e.g., Carey v. Population Services International, 431 U.S.678,686 (1977); Roe v. Wade, 410 U.S.113,154 (1973).

93/ The discrimination against women in the political arena, noted by the Court in Frontiero v. Richardson, 411 U.S.677,686 n.17 (1973), persists. See, e.g., Johnson and Carroll, Profile of Women Holding Office II 4A-7A (Eagleton Institute of Politics 1978); Nat'l Comm'n on the Observance of International Women's Year, The Spirit of Houston 38-41 (1978).

B. Serving No Legitimate Interest Whatsoever, the Challenged Restriction on Medicaid Funding of Medically Necessary Abortions Fails Both the Strict Scrutiny and Minimum Rationality Tests.

To survive constitutional review, strict scrutiny of the Hyde Amendment's classification requires that it further a compelling state interest. Not only does it fail to satisfy such a standard, Hyde falls short even when measured by the more minimal rationality test.

The Hyde classification treats indigent pregnant women for whom an abortion is medically necessary differently from Medicaid recipients who seek other medically necessary services. It also treats most indigent women in need of medically necessary abortions differently from women who decide to continue their pregnancies to term. In both cases, the funding restriction penalizes the woman with a health-threatening pregnancy who exercises her constitutional right to decide to terminate her pregnancy.

No compelling state interest exists to defend this classification. The government cannot justify the funding prohibition on fiscal grounds. Not only did the Court reject this argument in both Shapiro v. Thompson, 394 U.S.618,633 (1969), and Memorial Hospital v. Maricopa County, 415 U.S.250,263 (1974), but any saving from restricting Medicaid funds for therapeutic abortions is illusory. Costs of maternal care and delivery will far exceed the amount spent on medically necessary abortions.[94/] The government also will be called upon to pay the medical costs of indigent women who, as a result of continuing the pregnancy, suffer short- and long-term health damage, as well as medical costs necessary for the care of any children born with birth or congenital defects.[95/] As Justice Stevens noted in denying a stay in Williams v. Zbaraz, 99 S.Ct.2095,2098 (1979):

94/ Zbaraz v. Quern, 469 F.Supp.1212,1218 (N.D.Ill. 1979), prob. juris. noted, November 27, 1979; cf. Maher v. Roe, 432 U.S. 464,478-79 (1977).

95/ See Alan Guttmacher Institute, Abortions and The Poor: Private Morality, Public Responsibility, 32 (1979).

> Both the findings of the District Court and the record before me compellingly demonstrate that it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full-term pregnancy.

Nor does the challenged funding restriction protect maternal health. Hyde's effect is exactly the opposite.[96/] Indigent pregnant women seeking therapeutic abortions clearly suffer injury.

The only other interest these restrictions arguably promote is the protection of potential life. However, although Roe v. Wade, and its progeny establish that the state's interest in protecting the fetus becomes "compelling" after viability, this interest is at no time great enough to "outweigh the woman's interest in her health." Williams v. Zbaraz, 99 S.Ct. at 2098. The Court has made clear that concern for the woman's health is

---

96/ See Part IA, supra, for a discussion of the Hyde Amendment's impact on maternal health.

paramount throughout the pregnancy and that it is impermissible for the state to interfere with this health interest even to promote fetal life. See Colautti v. Franklin, 439 U.S.379, 398-400 (1979); Roe v. Wade, 410 U.S.113 164 (1973); cf. Planned Parenthood of Missouri v. Danforth, 428 U,S. 52 (1976). Women seeking medically necessary abortions, by definition, are in health- or life-endangering circumstances. By denying funds for medically necessary abortions, the Hyde Amendment effectively ignores the woman's health, thereby attempting to achieve by legislative fiat that which this Court has consistently ruled impermissible.

Nor is Maher v. Roe, 432 U.S.464 (1977), to the contrary. While Maher approves a policy decision to encourage normal childbirth and not require funding for non-therapeutic abortions, its rationale cannot support a provision denying funding for therapeutic abortions. Women who seek medically necessary abortion procedures do so because they face something other than "normal childbirth."

Promoting childbirth, irrespective of how abnormal or traumatic the pregnancy, over the woman's health was not the result envisioned by Maher. The determination of statutory rationality in that case was premised entirely on the fact that protecting the fetus would lead to normal childbirth. 432 U.S. at 478-79.

It is evident, then, that the Hyde Amendment serves no legitimate state interest, let alone a compelling one. For this reason, it fails both the strict scrutiny and the raional basis test. By any standard, the challenged Medicaid restriction cannot survive constitutional review.

CONCLUSION

For the reasons stated above, amici respectfully submit that the judgment and order of the District Court for the Eastern District of New York should be affirmed.

Respectfully submitted,

PHYLLIS N. SEGAL
JUDITH I. AVNER
NOW Legal Defense and Education Fund
36 West 44th Street
New York, New York 10036

JEAN MARSHALL CLARKE
425 13th Street, N.W.
Washington, D.C. 20004

LYNN MILLER
1055 Thomas Jefferson, N.W.
Washington, D.C. 20007

Attorneys for Amici Curiae*

*Counsel gratefully acknowledge the assistance of Jean Ambrose, Glen Banks, Eva C. Betz, Stephanie J. Clohesy, Mary Cecile Gee, Kim E. Greene, Ellen Kennelly, Marina Manese and Jeanne Miller.

Supreme Court, U. S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA ROBERTS HARRIS, SECRETARY, United States Department of Health, Education and Welfare,
Defendant-Appellant,

and

Senators JAMES L. BUCKLEY, *et al.*,
Intervenor-Defendants-Appellants,

v.

CORA MCRAE, *et al.*,
Plaintiffs-Appellees.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES, JOINED BY THE STATES OF NORTH CAROLINA AND OREGON, *AMICI CURIAE*

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5189

SHIRLEY ADELSON SIEGEL
Solictor General

PETER BIENSTOCK
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

ARNOLD D. FLEISCHER
BARBARA E. LEVY
Assistant Attorneys General
Of Counsel

(*Cover continued on back*)

RUFUS L. EDMISTEN
Attorney General of the
State of North Carolina
DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, North Carolina 27602

WILLIAM F. O'CONNELL
Special Deputy Attorney General

STEVEN MANSFIELD SHABER
Associate Attorney General
Of Counsel

JAMES A. REDDEN
Attorney General of the
State of Oregon
100 State Office Building
Salem, Oregon 97310

TABLE OF CONTENTS

PAGE

Interest of the *Amicus* 1

Questions Presented 4

Statement of Facts 4

POINT I—The Hyde Amendments' denial of federal funding for most medically necessary abortions denies Medicaid-eligible women their fundamental right to choose abortion 7

A. The District Court's conclusion that the Hyde Amendments prohibit Medicaid-eligible women from obtaining medically necessary abortions is clearly supported by the record 7

B. The Hyde Amendments are an undue burden on the fundamental right of women to choose to terminate a pregnancy 10

POINT II—The Hyde Amendments' exclusion of federal funds for medically necessary abortions is an irrational classification that denies Medicaid-eligible women equal protection of the laws.... 13

Conclusion 16

Cases PAGE

Beal v. *Doe*, 432 U.S. 438 (1977) 5, 9, 12, 13
Bellotti v. *Baird*, 428 U.S. 132 (1976) 12, 13
Doe v. *Bolton*, 410 U.S. 179 (1973) 8, 9, 15
McRae v. *Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976) 5
Maher v. *Roe*, 432 U.S. 464 (1977) 5, 11, 12, 13, 15
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 11, 12, 15
Roe v. *Wade*, 410 U.S. 113 (1973 .....7, 8, 11, 15
Whalen v. *Roe*, 429 U.S. 589 (1977) 11

Statutes

United States Constitution
First Amendment 11
Fifth Amendment 11, 12
Fourteenth Amendment 11
New York State Executive Law § 63 1
New York State Penal Law § 125.05 2
New York Social Services Law
§ 365-a(2) 4, 9
§ 365-a(5)(b) 9
New York Session Laws of 1976, ch. 76, § 1 3
Public Law 94-439, Section 209 (Oct. 1, 1976) ("Hyde Amendment" or "1977 Rider") 5, 6
Public Law 95-205, Section 101 (Dec. 9, 1977) ("Hyde Amendment" or "1978 Rider") 6
43 Fed. Reg. 4570, 4832 (1978) 6

PAGE

Title XIX of the Social Security Act, as amended, 42 U.S.C. 1396 *et seq.* 10, 11, 12, 13, 14
42 U.S.C. § 300a-21(a) 15

Other Sources

New York Legislative Documents, 193rd Session, 1970, Vol. 5 2
New York State Legislative Annual, 1970 ..... 2, 3
New York Department of Health, New York State Maternal Mortality Study, 1970-1976 (June, 1977) 3
New York Department of Social Services Administrative Directive 77 ADM-69 (August 24, 1977) ... 4
New York Department of Health, Vital Statistics of New York State, 1976, 1977, 1978 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA ROBERTS HARRIS, SECRETARY, United States Department of Health, Education and Welfare,

Defendant-Appellant,

and

Senators JAMES L. BUCKLEY, *et al.*,

Intervenor-Defendants-Appellants,

v.

CORA MCRAE, *et al.*,

Plaintiffs-Appellees.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES, JOINED BY THE STATES OF NORTH CAROLINA AND OREGON, *AMICI CURIAE*

Interest of the *Amicus*

The *amicus curiae,* Attorney General of the State of New York, pursuant to his responsibilities as chief legal officer of the State under New York Executive Law § 63, has a vital interest in protecting the civil rights of the citizens of the state, particularly those least able to protect themselves—the poor and disadvantaged.

The Attorney General has at least two reasons for interest in the outcome of this case. The state has a direct financial interest in receiving federal reimbursement for medically necessary abortions which are presently covered only by state and local funds. More important, however, the Attorney General is vitally concerned in the outcome because it will profoundly affect the liberty interests guaranteed to poor pregnant woman by the United States Constitution and New York State law.

Since 1970, New York State has assumed a leadership role in protecting the right of each woman to decide whether or not to continue a pregnancy based solely on her own conscience and her doctor's medical advice. The State Legislature then affirmed that "the right of a mature person of sound mind to have personal control over his [sic] body is fundamental." 1969 Annual Report of the Correctional Association of New York, New York Legislative Documents, 193rd Session, 1970, Vol. 5, Doc. No. 91. Faced with the brutal fact that illegal abortions were the single largest cause of maternal death in the United States, the New York State Legislature voted on April 10, 1970, to amend the provisions of Penal Law § 125.05, which defined as criminal abortion performed at any time during pregnancy.* This amendment repealed the criminal sanctions against abortions performed during the first two trimesters of pregnancy. It constituted a clear acknowledgment that the state had no right to interfere in a woman's most personal decision concerning her body and her life. The state's interest in preserving life had to be viewed within the grim reality that the criminal penalties for abortions were forcing millions of women around the country to seek out illegal abortionists in whose hands thousands of them had died. Memorandum of Assemblywoman Constance E. Cook, N.Y. State Legislative Annual, 1970, pp. 240-242.

---

* The statute excepted abortions performed in order to save the life of the mother.

Since 1970, the liberalized New York abortion law has contributed to a dramatic reduction in the incidence of maternal mortality. N.Y. Department of Health, N.Y. State Maternal Mortality Study, 1970-1976, June, 1977, p. 1. In particular, for the period 1972-1976, no maternal deaths attributable to illegal abortion procedures were reported in New York State, compared to the two to seven annual deaths attributable to complications from illegal abortion for the period 1960-1972. *Id.* at 14.

This experience bears out the views expressed by Assemblywoman Constance E. Cook in her memorandum in support of the 1970 bill:

> "Since the law prohibiting abortion except to save the life of the woman was first enacted, health care has changed radically. The law was enacted at the time when abortion could prove fatal to the person upon whom it was performed because of lack of aseptic techniques. Historic reasons for the criminal abortion laws are obsolete . . . The medical profession is being unjustifiably inhibited by the present law. Doctors are often forced to choose between ignoring their best medical judgment, or referring the patient to someone who will perform an abortion." N.Y.S. Legislative Annual, 1970, p. 241.

Recognizing the irrationality of forcing this kind of choice upon pregnant women and the doctors providing them with medical care, the New York Legislature has deemed the delivery of *all* medically necessary services, including medically necessary abortions, a matter of important state policy. Even in the face of emergency fiscal crises, the Legislature reaffirmed that "New York has a long, proud history of providing generously for people in need, and the Legislature has no intention of foresaking that history." N.Y. Session Laws of 1976, ch. 76, § 1. Thus, even though the Hyde Amendments have severely restricted

the availability of federal reimbursement for abortions,* New York's medical assistance plan continues to provide state and local Medicaid funds for any abortion found medically necessary by the patient's attending physician. *See* New York Social Services Law §§ 365-a(2), (5) (b) and New York Dept. of Social Services Administrative Directive 77 ADM-69 (August 24, 1977).

The *amicus* New York State Attorney General accordingly views the decision by Judge Dooling below as a vindication of this state's policy of funding medically necessary abortions for indigent women. The *amicus* considers the Hyde Amendments irrational in their purpose and pernicious in their effect—an attempt to incorporate into national policy elements of sex, race and class bias that are utterly repugnant to the aims and ideals of our society. For these reasons, the *amicus* submits this brief urging affirmance of the decision below.

Questions Presented

1. Does the Hyde Amendments' denial of federal Medicaid funding to Medicaid-eligible women for most medically necessary abortions constitute an impermissible burden on a woman's fundamental constitutional right to choose to terminate her pregnancy?

2. Is the Hyde Amendments' prohibition against the use of federal Medicaid funds for most medically necessary abortions an irrational classification which violates the Equal Protection Clause of the United States Constitution?

Statement of Facts

Since June, 1976, Congress has considered and enacted several amendments to the yearly appropriations bill for the Department of Health, Education and Welfare ("HEW") which have sought severely to restrict or eliminate the use of federal Medicaid funds for medically necessary abortions.

---

* These restrictions have resulted in a nationwide decrease of nearly 99% in the number of abortions receiving federal reimbursement since 1977.

The first of these enactments, commonly known as the Hyde Amendments, was proposed on June 26, 1976 by Representative Henry Hyde and provided that none of the funds contained in the FY 1977 Labor-HEW Appropriations Bill, H.R. 14232, were to be used to pay for abortions or to promote or encourage abortions. Although passed by the House, this absolute Rider failed to pass the Senate and was sent to the Labor-HEW Appropriations Conference Committee for resolution. Ultimately, a compromise Rider was enacted which prohibited the use of federal Medicaid funds to pay for abortions except where the mother's life was clearly endangered or where the pregnancy resulted from rape or incest. This took effect on October 1, 1976. Section 209 of P.L. 94-439.

On that same day, October 1, 1976, this class action (originally *McRae* v. *Mathews*) was filed in the United States District Court for the Eastern District of New York on behalf of all pregnant Medicaid-eligible women seeking to terminate their pregnancies and all providers of abortion under Medicaid. It sought declaratory and injunctive relief against the Secretary of HEW to prevent implementation of the 1977 Hyde Amendment on statutory and constitutional grounds. The District Court issued a temporary restraining order on October 1, 1976. On October 22, 1976, the Court issued and, on October 29, 1976, reaffirmed, a preliminary injunction against implementation of the Hyde Amendment nationwide. 421 F. Supp. 533 (E.D.N.Y. 1976).*

On June 29, 1977, this Court ordered the judgment vacated and remanded the case to the District Court for reconsideration in light of *Beal* v. *Doe,* 432 U.S. 438, and *Maher* v. *Roe,* 432 U.S. 464 (1977). On remand, additional Medicaid-eligible pregnant women and doctors providing Medicaid-funded abortions in states which had implemented restrictive standards were permitted intervention as plain-

---

* The October 22 decision certified plaintiffs' classes of indigent eligible women and abortion providers and permitted intervention as defendants by Isabelle H. Pernicone as guardian *ad litem* and by Senators Buckley and Helms and Congressman Hyde as taxpayers.

tiffs on that date. The injunction was vacated and a new temporary restraining order was issued by the District Court. The temporary restraining order was lifted on August 4, 1977. The Secretary of HEW immediately implemented the 1977 Hyde Amendment.

The 1977 Hyde Amendment was a one-year appropriation. Thus, the debate was soon resumed. On December 7, 1977 the House and Senate passed a compromise abortion amendment which prohibited use of federal Medicaid funds for abortions with three exceptions: where the woman's life was endangered; where she was the victim of rape or incest which had been promptly reported to a law enforcement agency or public health service; or where two physicians determined she would suffer severe and long-lasting physical health damage if the pregnancy were carried to term.

President Carter signed the FY 1978 version of the Hyde Amendment, Section 101 of P.L. 95-205, on December 9, 1977.

On January 26, 1978, Secretary of HEW Califano issued regulations implementing the 1978 Rider. 48 Fed. Reg. 4570, 4832 (1978).

Evidentiary hearings before Judge Dooling in the District Court began August 3, 1977. The trial of several weeks' duration produced a transcript of over 6,000 pages and 800 exhibits.

On January 15, 1980, the District Court, after thirteen months of deliberation, issued a 329-page opinion declaring the Hyde Amendments unconstitutional. Judge Dooling futher issued an order, which he stayed for 30 days to allow an appeal, requiring the federal government to pay its share of the cost of all medically necessary abortions. On February 10, 1980, this Court voted to vacate that stay, and since that time, federal Medicaid reimbursement for medically necessary abortions has resumed.

POINT I

The Hyde Amendments' denial of federal funding for most medically necessary abortions denies Medicaid-eligible women their fundamental right to choose abortion.

A. The District Court's conclusion that the Hyde Amendments prohibit Medicaid-eligible women from obtaining medically necessary abortions is clearly suported by the record.

In *Roe* v. *Wade,* 410 U.S. 113 (1973), this Court, acknowledging its "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspired," defined its task as "resolv[ing] the issue by constitutional measurement, free of emotion and of predilection," *Id.* at 116. The decision of Judge Dooling in this case, issued after the extensive trial and his lengthy consideration, reflects his recognition of this responsibility and his adherence to the analytical standard established in *Roe.*

The opinion below contains numerous findings of fact which support the court's conclusion that by restricting the use of federal Medicaid funds for abortions, the Hyde Amendments effectively deny medically necessary abortions to poor (*i.e.,* Medicaid-eligible) women. Significant among the court's findings are those which appear at pages 308-9 of the opinion:

> "The evidence requires the finding that by the professional standards of modern medicine adequate and timely treatment of pregnancy includes recourse to abortion, . . . and that the 'life endangerment' and 'severe and long-lasting physical health damage' standards [of the Hyde Amendments] do not include but exclude the greater part of the cases in which the

profession would recommend abortion as medically necessary procedure to safeguard the pregnant woman's health. The evidence requires the finding that the endangerment of the mental health of the pregnant woman, . . . can reach a degree that in professional medical judgment makes abortion medically necessary in the sense of *Doe* v. *Bolton, supra*, 410 U.S. at 192. The evidence justifies the conclusion that pregnancy among younger teenagers, and the constellation of special health problems pregnancy involves for them, make abortion medically necessary over a broader range of instances than in the case of women in their twenties. The evidence warrants the finding that poverty entrains enhanced health risks, nutritional deficiencies, and limitations on access to health care that make the incidence of medically necessary abortion markedly higher among the poor than among those who have the means to maintain well-nourished life and regular health care. Unwantedness itself is a factor deranging the management of pregnancy, and aggravating the risks from otherwise controllable complications. The evidence shows farther that the professional standards of modern medicine accept that grave fetal defect, determined early in pregnancy with a high degree of probability, may make abortion medically necessary in the judgment of a larger part of the medical profession."

In sum, for plaintiffs, this case is not primarily a matter of the *funding* of medically necessary abortions; it is rather a matter of their availability. Faced with that stark reality, the lower court simply followed the teachings of *Roe* and its progeny; because the Hyde Amendments would have the result (which their proponents clearly intended) of effectively prohibiting poor woman from having medically necessary abortions, they are unconstitutional under the terms of *Roe* v. *Wade* and *Doe* v. *Bolton* alone.

Every pregnancy entails risks to the health and well-being of the pregnant woman which the attending physician may be called upon to evaluate in order to determine whether an abortion is necessary. This is " 'a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.' " *Beal* v. *Doe*, 432 U.S. 438, 442 n. 3 (1977), *quoting Doe* v. *Bolton*, 410 U.S. 179, 192 (1973). Yet the Hyde Amendments on their face exclude most abortions which physicians would find medically necessary.

Dramatic evidence of the result of the foregoing is the overall percentage decline in Medicaid abortions since the Hyde Amendments have been in effect—98.2%. Transcript p. 4874. "The effect of the legislation has been to reduce the number of abortions funded by the [federal] government from about 250,000 to 300,000 annually to a few thousand a year." Opinion p. 158. For Medicaid-eligible women, in short, abortion has been reduced to a crisis intervention procedure. Opinion p. 110.

> "The evidence requires the conclusion that the consequence of the legislation has been at a very minimum to delay abortions with the serious consequences of increasing maternal mortality risks, that the restrictions on funding have in fact caused some resort to illegal abortion, although the extent of that is not measurable, and that in fact Medicaid-eligible women who wish to terminate their pregnancies have no significant alternative to Medicaid for obtaining abortion." Opinion p. 158.*

---

* New York's policy of continuing to fund medically necessary abortions pursuant to § 365-a of the New York Social Services Law marks an exception to the "general effect of the federal legislation [which] has been to bring about conformity between state funding and the federal pattern." Opinion p. 158.

The "alternatives" facing a Medicaid-eligible woman who seeks an abortion which, though medically necessary, is not funded under the Hyde Amendments, are grim. As the court below found, "[t]here is no evidence . . . that Medicaid-eligible women have been able to obtain legally induced abortions through any use of their necessarily exiguous 'personal funds,' or at free public hospitals, or through philanthropic assistance, or reduced clinical charges." Opinion pp. 74-75. Illegal abortion and self-abortion, with all their attendant dangers, are obviously acts of desperation; however, women who do not or cannot choose those "options" face increasingly dangerous medical consequences as their unwanted pregnancies advance and the conditions that originally made the abortion medically necessary are aggravated. *See* Opinion pp. 92-95. Moreover, unwanted pregnancy is likely to impair the mental health of Medicaid-eligible women, "producing severe mental disturbance, including suicidal ideation, in the case of patients in trying life circumstances who are already near the limits of endurance." Opinion p. 116.

The evidence considered by Judge Dooling not only warrants, but compels the conclusion reached below. By prohibiting the use of federal Medicaid funds for abortions which are medically necessary according to commonly applied professional standards of diagnosis and treatment, the Hyde Amendments, in practice, deny Medicaid-eligible women access to such abortions even when dictated by their individual pathology and circumstances.

B. The Hyde Amendments are an undue burden on the fundamental right of women to choose to terminate a pregnancy.

The court below found that the Hyde Amendments have the effect of excluding *medically necessary* abortions from the coverage of Title XIX of the Social Security

Act, as amended, 42 U.S.C. § 1396 *et seq.* To the Medicaid-eligible woman, for whom this exclusion constitutes a denial of the choice whether or not to terminate her pregnancy, "it is difficult to imagine a more complete abridgement of a constitutional freedom . . ." *Roe* v. *Wade,* 410 U.S. 113, 170 (1972) (*Stewart,* J., concurring).

This Court established in *Roe* v. *Wade* that the right of a woman to choose abortion is fundamental, founded in the Fourteenth Amendment's concept of personal liberty (as to states) and by implication in the due process clause of the Fifth Amendment (as to the federal government).* *Id.* at 152-3. *Roe* held that until the point of viability of the fetus, approximately at the end of the first trimester of pregnancy, "the attending physician in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated." *Id.* at 163. After viability, the state may promote its interests in both the health of the mother and the potentiality of human life by regulating abortion in ways that are reasonably related to those interests. *Id.* at 163-4.

The right created in *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe,* 432 U.S. 464, 473-4 (1977). In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 70-71, n. 11 (1976), this Court declared that Missouri's requirement of spousal consent to abortion was such an unconstitutional

---

* A women's right to choose abortion is further protected by the First Amendment's guarantee of religious freedom. As Judge Dooling found, the teachings of many religious groups "in the mainstream of the country's religious beliefs" affirm the right of a woman to choose abortion and in fact, as with the Reform and Conservative Jewish teachings, mandate abortion to preserve her health. Opinion pp. 326-328. A woman's right to be at liberty to make this personal decision is "doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment." Opinion p. 328.

obstacle to "the effectuation of [the woman's] and her physician's decision to terminate her pregnancy." *See also, Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976).

"These cases recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion." *Maher* v. *Roe, supra* at 473, *quoting Whalen* v. *Roe,* 429 U.S. 589, 599-600, and nn. 24 and 26 (1977). Without actually prohibiting all abortions, the Hyde Amendments achieve that result for poor women as effectively as if they contained such an explicit prohibition. By excluding the majority of medically necessary abortions from the certifiable categories, the Hyde Amendments compel Medicaid-eligible women to resort to "alternatives" ranging from illegal abortion to mental derangement. By couching the standards for eligible abortions in terms that are foreign to routine medical practice and usage, the Hyde Amendments make it virtually impossible for the attending physician safely to certify that any particular abortion, even though medically necessary, is within the Hyde Amendments' limits.

The factual findings of the court below clearly demonstrate that the Hyde Amendments do not "merely" make the exercise of the fundamental right to abortion difficult for Medicaid-eligible women. *Cf. Maher* v. *Roe, supra.* See *Beal* v. *Doe, supra* at 457, *Marshall,* J., dissenting. Rather, this legislation erects an "absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference." *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 71, n. 11. "The enactments challenged here brutually coerce poor women to bear children whom society will scorn for every day of their lives." *Beal* v. *Doe, supra* at 456 (*Marshall,* J., dissenting). They violate the Fifth Amendment.

POINT II

The Hyde Amendments' exclusion of federal funds for medically necessary abortions is an irrational classification that denies Medicaid-eligible women equal protection of the laws.

The Hyde Amendments establish a classification within Title XIX of the Social Security Law which distinguishes medically necessary abortions from all other medically necessary procedures. Although there may be no constitutional obligation to provide or pay for any of the medical expenses of this class of women, "when [government] decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe, supra* at 469-70. See *Beal* v. *Doe, supra* at 444-5. To the extent that the Hyde Amendments alter and contradict Title XIX's objectives, as stated in 42 U.S.C. § 1396, by withholding medical assistance to meet the costs of medically necessary abortions, they fail to comply with constitutional standards.

This Court has previously held that "[t]he constitutionality of such distinction [between abortion and other procedures] will depend upon its degree and the justification for it." *Bellotti* v. *Baird, supra* at 149-50. The evidence presented at trial in this case clearly established that Medicaid-eligible women "have no significant alternative to Medicaid for legal abortions." The "degree" of the distinction effected by the Hyde Amendments, therefore, is, to all intents and purposes, absolute. The rational "justification for it" is nonexistent.

Unlike the state legislation upheld by this Court in *Maher* v. *Roe, supra,* and *Beal* v. *Doe, supra,* the Hyde Amendments do not involve constitutionally permissible restrictions or the funding and availability of non-thera-

peutic, "elective" abortions. The Hyde Amendments are devastating because of their impact on the availability of *medically necessary* abortions. Opinion p. 290. These consequences bear no relation to the purpose of Medicaid, which is to assist the states in providing medical services to individuals "whose income and resources are insufficient to meet the costs of *necessary medical services* . . ." 42 U.S.C. § 1396 (emphasis added). Instead, the Hyde Amendments compel attending physicians to exercise their professional judgment on the basis of standards which are devoid of medical meaning and preclude consideration of all of the factors that are medically relevant to a proper evaluation of the pregnant woman's health and well-being.*

The classification established by the Hyde Amendments is unrelated to any attempt to insure proper standards of medical care. The language of the Hyde Amendments not only imposes improper limits on the attending physician, it does not even include risks to the woman's mental health or the likelihood of grave fetal defects as eligible bases for funding.

The current Hyde Amendment's requirement that abortions necessary for victims of rape or incest will be funded only "when such rape or incest has been reported promptly to a law enforcement agency or public health service" is particularly irrelevant to any legitimate standards of health care. Conditioning funds for abortions in these instances on prompt reporting, which has no relationship whatsoever to medical necessity, is an example of the arbitrary, misogynistic bias inherent in the Hyde Amendments.

---

* *Cf.* the finding below that "the opinion current in the medical world was that abortion-related deaths were in large part attributable to illegal induced abortions, and that *the general availability of legal abortion services* after the 1973 decisions [in *Roe* and *Doe*] *radically reduced* [*maternal*] *mortality* due to illegal induced abortion. *See, e.g.*, W. Cater & R.W. Rochat, Illegal Abortions in the United States: 1972-1974, in Family Planning Perspectives, Vol. 8, No. 2, March-April 1976 (DHEW reprint)." Opinion p. 11 (emphasis added); *see also* Opinion pp. 9-10.

These considerations are especially significant in the case of the statutory class of adolescents at a high risk of pregnancy found by the court below to be a "suspect class." Opinion p. 315; 42 U.S.C. § 300a-21(a). In New York, by virtue of this state's liberal abortion laws and continued state Medicaid funding of medically necessary abortions, the number of abortions performed on pregnant women age nineteen and below exceeded the number of live births in each of the years from 1976 to 1978, indicating the degree of unwanted pregnancies among this class. See N.Y. Dept. of Health, Vital Statistics of New York State, published annually in 1976, 1977 and 1978, Tables 20-21 (1976 and 1977 editions) and 21-22 (1978 edition). The court below, considering the Congressional findings expressed in 42 U.S.C. § 3—a-21(a) and studies conducted by the Department of Health, Education and Welfare, as well as extensive testimony at trial, found that pregnancies not only entail greater risks to an adolescent's physical and mental health than that of older women, but also are less susceptible to successful outcomes even when comprehensive prenatal care—uncommon in this group—is obtained. Opinion pp. 134-44.

The court below commented that Congressional proponents of the restrictions ultimately included in the Hyde Amendment "left nothing to debate, for their view was that abortion was the taking of human life and, therefore, not debatable." Opinion p. 164. Recognition of this reality is essential to an understanding of the only purpose reasonably related to the classification established by the Hyde Amendments: the elimination of abortion through the imposition of statutory obstacles that in practice preclude most Medicaid-eligible women from exercising their fundamental right to choose abortion. This Court rejected similar obstacles in *Roe* v. *Wade, supra, Doe* v. *Bolton, supra,* and *Planned Parenthood of Central Missouri* v. *Danforth, supra; see Maher* v. *Roe, supra* at 473. So, too, should it reject the unconstitutional classification created by the Hyde Amendments.

CONCLUSION

For the above-stated reasons, the decision of the United States District Court for the Eastern District of New York should be affirmed.

Dated: New York, New York
March 17, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Amicus Curiae
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5189

SHIRLEY ADELSON SIEGEL
Solicitor General

PETER BIENSTOCK
Bureau Chief, Civil Rights Bureau
Assistant Attorney General

ARNOLD D. FLEISCHER
BARBARA E. LEVY
Assistant Attorneys General
Of Counsel

Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1268

PATRICIA R. HARRIS, Secretary, United States Department of Health, Education, and Welfare,

Appellant,

v.

CORA McRAE, JANE DOE, MARY DOE, SUSAN ROE, ANN MOE, Individually and on Behalf of All Others Similarly Situated; PLANNED PARENTHOOD OF NEW YORK CITY, INC.; and IRWIN B. TERAN, M.D., JANE HODGSON, M.D., DAVID B. BINGHAM, M.D., HUGH SAVAGE, M.D., EDGAR W. JACKSON, LEWIS H. KOPLIK, M.D., Individually and on Behalf of All Others Similarly Situated; WOMEN'S DIVISION OF THE BOARD OF GLOBAL MINISTRIES OF THE UNITED METHODIST CHURCH, THERESSA HOOVER, Its Associate General Secretary, ELLEN KIRBY, Its Executive Director,

Appellees,

and

SENATORS JAMES L. BUCKLEY and JESSE A. HELMS, CONGRESSMAN HENRY J. HYDE and ISABELLA M. PERNICONE, ESQ.,

Intervenors-Appellees,

and

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Appellee.

BRIEF OF REP. JIM WRIGHT, REP. JOHN J. RHODES, REP. ROBERT H. MICHEL, REP. LINDY BOGGS, REP. MARY ROSE OAKAR, SENATOR WILLIAM PROXMIRE, SENATOR THOMAS F. EAGLETON, SENATOR EDWARD ZORINSKY, AND CERTAIN OTHER MEMBERS OF THE CONGRESS OF THE UNITED STATES AS AMICI CURIAE.

JOHN T. NOONAN, JR.,
474 Boalt Hall,
University of California School of Law,
Berkeley, CA 94720

BASILE J. UDDO,
3715 Vincennes Place,
New Orleans, LA 70125

WILLIAM B. BALL,
BALL & SKELLY,
511 North Second Street,
P. O. Box 1108,
Harrisburg, PA 17108

Attorneys for Amici Curiae.

March 18, 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

	Page
INTEREST OF THE *Amici Curiae*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The District Court's Order Violates the Appropriations Clause of Article I	7
The Three Deficiencies of the District Court's Order	8
The Extent of the Challenge to the Constitutional Authority of Congress	14
The Sources of the District Court's Error	21
II. The District Court Erred in Not Dismissing the Action as Nonjusticiable in That It Presented a Political Question	24
1. Textual Commitment of the Power to Congress	26
2. Lack of Judicially Manageable Standards	27
3. Impossibility of Deciding Without a Policy Determination of a Kind Clearly for Nonjudicial Discretion	29
4. Expression of Lack of Respect Due a Coordinate Branch of Government	29
5. Unusual Need for Unquestioning Adherence to a Political Decision Already Made	30
CONCLUSION	32

TABLE OF AUTHORITIES.

Cases: Page

Austin v. United States, 155 U. S. 417 (1894) 16, 17
Baker v. Carr, 369 U. S. 186 (1962) 25
Beal v. Doe, 432 U. S. 438 (1977) 22
Califano v. Wescott, — U. S. —, 61 L. Ed. 2d 382 (1979) ...21, 22
Cincinnati Soap Company v. United States, 301 U. S. 308 (1937) 16, 18
Collins v. United States, 15 Ct. Cl. 22 (1878) 18
Dandridge v. Williams, 397 U. S. 471 (1970) 31
Doe v. Bolton, 410 U. S. 179 (1973) 22
Doe v. Busbee, 471 F. Supp. 1326 (N. D. Ga. 1979) 8
Doe v. Matthews, 420 F. Supp. 865 (D. N. J. 1976) 18, 20
Gilligan v. Morgan, 413 U. S. 1 (1973) 26, 27
Hart v. United States, 118 U. S. 62 (1868) 16, 17
Hodgson v. Board of County Commissioners, Civ. No. 4-78-525 and Civ. No. 3-79-56 (D. Minn. 1979) 8
Knote v. United States, 95 U. S. 149 (1877) 16
Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945) aff'd on other grounds, 328 U. S. 303 (1946) 16, 18, 19, 21, 22, 23, 24, 25, 26
Maher v. Roe, 432 U. S. 464 (1977) 22
McRae v. Matthews, 421 F. Supp. 533 (E. D. N. Y. 1976) .. 21
McRae, et al. v. Secretary of Health, Education, and Welfare, et al., No. 76 C 1804 (E. D. N. Y. 1979) 8, 22, 24, 27
Milliken v. Bradley, 433 U. S. 267 (1977) 14
Planned Parenthood Affiliates of Ohio v. Rhodes, — F. Supp. — (S. D. Ohio, 1979) 8
Poelker v. Doe, 432 U. S. 519 (1977) 22
Preterm, Inc. v. Dukakis, 591 F. 2d 121 (1st Cir. 1979) 8
Reeside v. Walker, 52 U. S. (11 How.) 623 (1850) 16, 17, 18
Roe v. Wade, 410 U. S. 113 (1973) 22
Spaulding v. Douglas Aircraft Company, Inc., 60 F. Supp. 985 (S. D. Cal. 1945) 18
Stitzel-Weller Distilling v. Wickard, 118 F. 2d 19 (1941) ... 18
United States v. Klein, 80 U. S. (13 Wall.) 128 (1872) 17

TABLE OF AUTHORITIES (Continued).

Cases (Continued): Page

United States v. Nixon, 418 U. S. 683 (1974) 24
Welsh v. United States, 398 U. S. 333 (1970) 22

Constitutional Provisions:

U. S. Const., art. I, § 1 .....5, 7, 26
U. S. Const., art. I, § 8, cl. 16 26
U. S. Const., art. I, § 9 .....11, 17, 23
U. S. Const., art. I, § 9, cl. 7 .....5, 6, 7, 9, 20, 33
U. S. Const., art. III 24, 33

Statutes:

Medicaid Act, 42 U. S. C. § 1396, et seq. 8, 22
Pub. L. No. 95-431, § 103, 92 Stat. 1025 (1978) 9, 28
Pub. L. No. 95-480, § 102, 92 Stat. 1571 (1978) 28
Pub. L. No. 95-480, § 104, 92 Stat. 1589 (1978) 9, 28

Other Authorities:

BRYCE, THE AMERICAN COMMONWEALTH (MacMillian, 1905) 29
93 CONG. REC. 2973-75 (1947) 20
93 CONG. REC. 2977 (1947) 20
93 CONG. REC. 2987-91 (1947) 20
119 CONG. REC. 5086 (1973) 13
119 CONG. REC. 10160 (1973) 13
126 CONG. REC. 1062 (1980) 30
C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1935) 10
DEMOCRATIC STUDY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, "THE APPROPRIATIONS RIDER CONTROVERSY", SPECIAL REPORT No. 95-12, February 14, 1978 .. 11
L. FISHER, THE AUTHORIZATION-APPROPRIATIONS PROCESS: FORMAL RULES AND INFORMAL PRACTICES (Congressional Research Service, Library of Congress, 1979) 29
MONTESQUIEU, THE SPIRIT OF THE LAWS (6th ed., T. Nugent trans. 1792) 14

TABLE OF AUTHORITIES (Continued).

Other Authorities (Continued): Page

J. NOONAN, A PRIVATE CHOICE, 112-117 (1979) 29

REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93rd Congress, 2nd Sess. Report No. 93-1305 (1974) 13, 14

CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES (ed. Deschler) 9, 10, 19

THE FEDERALIST PAPERS, No. 58 (Mod. Lib. ed.) (J. Madison) 14, 15, 30

THE FEDERALIST PAPERS, No. 78 (Mod. Lib. ed.) (A. Hamilton) 15

The Washington Post, February 20, 1980, A 14 30

INTEREST OF THE AMICI CURIAE.

The *amici curiae* consist of 238 members of the Congress, including more than a majority of the members of the House of Representatives, as follows:

Abdnor, James, S. Dak., 2nd; Albosta, Donald Joseph, Mich., 10th; Ambro, Jerome A., N. Y., 3rd; Andrews, Mark, N. Dak., AL; Annunzio, Frank, Ill., 11th; Applegate, Douglas, Ohio, 18th; Archer, Bill, Texas, 7th; Ashbrook, John M., Ohio, 17th; Aspin, Les, Wis., 1st; Atkinson, Eugene V., Pa., 25th; Badham, Robert E., Calif., 40th; Bafalis, L. A. (Skip), Fla., 10th; Bailey, Don, Pa., 21st; Baldus, Alvin, Wis., 3rd; Barnard, Doug, Ga., 10th; Bauman, Robert E., Md., 1st; Beard, Edward P., R. I., 2nd; Beard, Robin L., Tenn., 6th; Bedell, Berkley, Iowa, 6th; Benjamin, Adam, Jr., Ind., 1st; Bereuter, Douglas K., Nebr., 1st; Bethune, Ed, Ark., 2nd; Bevill, Tom, Ala., 4th; Biaggi, Mario, N. Y., 10th; Boggs, Lindy, La., 2nd; Boland, Edward P., Mass., 2nd; Boner, William Hill, Tenn., 5th; Bonior, David E., Mich., 12th; Bouquard, Marilyn Lloyd, Tenn., 3rd; Bowen, David R., Miss., 2nd; Breaux, John B., La., 7th; Broomfield, William S., Mich., 19th; Brown, Clarence J., Ohio, 7th; Burgener, Clair W., Calif., 43rd; Burlison, Bill D., Mo., 10th; Byron, Beverly B., Md., 6th; Campbell, Carroll A., Jr., S. C., 4th; Carney, William, N. Y., 1st; Cavanaugh, John J., Nebr., 2nd; Chappell, Bill, Jr., Fla., 4th; Cheney, Richard Bruce, Wyo., AL; Clausen, Don H., Calif., 2nd; Clinger, William F., Jr., Pa., 23rd; Collins, James M., Texas, 3rd; Conte, Silvio O., Mass., 1st; Corcoran, Tom, Ill., 15th; Coughlin, Lawrence, Pa., 13th; Corrada, Baltasar, P. R., Res. Com.; Courter, James A., N. J., 13th; Crane, Daniel B., Ill., 22nd; Crane, Philip M., Ill., 12th; D'Amours, Norman E., N. H., 1st; Daniel,

Dan, Va., 5th; Daniel, Robert W., Jr., Va., 4th; Dannemeyer, William, Calif., 39th; Davis, Robert, Mich., 11th; delaGarza, E., Texas, 15th; Deckard, H. Joel, Ind., 8th; Derwinski, Edward, Ill., 4th; Devine, Samuel, Ohio, 12th; Dickinson, William, Ala., 2nd; Donnelly, Brian, Mass., 11th; Dornan, Robert, Calif., 27th; Dougherty, Charles, Pa., 4th; Duncan, John, Tenn., 2nd; Early, Joseph, Mass., 3rd; Edwards, Jack, Ala., 1st; Edwards, Mickey, Okla., 5th; Emery, David, Maine, 1st; Erdahl, Arlen, Minn., 1st; Erlenborn, John, Ill., 14th; Evans, Billy Lee, Ga., 8th; Fary, John G., Ill., 5th; Fish, Hamilton, Jr., N. Y., 25th; Fithian, Floyd, Ind., 2nd; Fuqua, Don, Fla., 2nd; Gephardt, Richard, Mo., 3rd; Gibbons, Sam, Fla., 7th; Gingrich, Newt, Ga., 6th; Goldwater, Barry M. Jr., Ca., 20th; Goodling, William, Pa., 19th; Gradison, Willis D., Jr., Ohio, 1st; Gramm, Phil, Texas, 6th; Grassley, Charles, Iowa, 3rd; Grisham, Wayne, Calif., 33rd; Guarini, Frank, N. J., 14th; Guyer, Tennyson, Ohio, 4th; Hagedorn, Tom, Minn., 2nd; Hall, Sam B., Jr., Texas, 1st; Hammerschmidt, John Paul, Ark., 3rd; Hanley, James M., N. Y., 32nd; Hansen, George, Idaho, 2nd; Heckler, Margaret, Mass., 10th; Hillis, Elwood, Ind., 5th; Hinson, John, Miss., 4th; Hopkins, Larry J., Ky., 6th; Hubbard, Carroll, Jr., Ky., 1st; Huckaby, Jerry, La., 5th; Hutto, Earl D., Fla., 1st; Ichord, Richard, Mo., 8th; Ireland, Andy, Fla., 8th; Jacobs, Andrew, Jr., Ind., 11th; Jeffries, Jim, Kansas, 2nd; Jenkins, Ed, Ga., 9th; Kazen, Abraham, Jr., Texas, 23rd; Kelly, Richard, Fla., 5th; Kemp, Jack, N. Y., 38th; Kildee, Dale, Mich., 7th; Kindness, Thomas, Ohio, 8th; Kramer, Ken, Colo., 5th; LaFalce, John, N. Y., 36th; Lagomarsino, Robert, Calif., 19th; Latta, Delbert, Ohio, 5th; Leach, Claude, La., 4th;

Leach, Jim, Iowa, 1st; Lederer, Raymond F., Pa., 3rd; Lee, Gary, N. Y., 33rd; Lent, Norman, N. Y., 4th; Lewis, Jerry, Calif., 37th; Livingston, Robert L., La., 1st; Loeffler, Thomas, Texas, 21st; Long, Gillis, La., 8th; Lott, Trent, Miss., 5th; Lujan, Manuel, Jr., N. M., 1st; Luken, Thomas, Ohio, 2nd; Lungren, Dan, Calif., 34th; Markey, Edward, Mass., 7th; Marlenee, Ron., Mont., 2nd; Marriott, Dan, Utah, 2nd; Mavroules, Nicholas, Mass., 6th; Mazzoli, Romano, Ky., 3rd; McClory, Robert, Ill., 13th; McDade, Joseph, Pa., 10th; McDonald, Larry, Ga., 7th; McEwen, Robert, N. Y., 30th; McHugh, Matthew, N. Y., 27th; McKay, Gunn, Utah, 1st; Mica, Dan, Fla., 11th; Michel, Robert, Ill., 18th; Miller, Clarence, Ohio, 10th; Minish, Joseph, N. J., 11th; Mitchell, Donald, N. Y., 31st; Moakley, John, Mass., 9th; Montgomery, G. V. (Sonny), Miss., 3rd; Moore, W. Henson, La., 6th; Moorhead, Carlos, Calif., 22nd; Mottl, Ronald, Ohio, 23rd; Murphy, Austin, Pa., 22nd; Murphy, John, N. Y., 17th; Murphy, Morgan, Ill., 2nd; Murtha, John, Pa., 12th; Myers, John, Ind., 7th; Myers, Michael, Pa., 1st; Nichols, Bill, Ala., 3rd; Nowak, Henry, N. Y., 37th; O'Brien, George, Ill., 17th; Oakar, Mary Rose, Ohio, 20th; Oberstar, James, Minn., 8th; Pashayan, Charles, Jr., Calif., 17th; Patten, Edward, N. J., 15th; Paul, Ron, Texas, 22nd; Perkins, Carl, Ky., 7th; Petri, Thomas, Wis., 6th; Porter, John, Ill., 10th; Price, Melvin, Ill., 23rd; Quayle, Dan, Ind., 4th; Quillen, James, Tenn., 1st; Rahall, Nick Joe II, W. Va., 4th; Regula, Ralph, Ohio, 16th; Rhodes, John, Ariz., 1st; Rinaldo, Matthew, N. J., 12th; Robinson, J. Kenneth, Va., 7th; Roe, Robert, N. J., 8th; Rostenkowski, Dan, Ill., 8th; Roth, Toby, Wis., 8th; Rousselot, John, Calif., 26th; Royer, William, Calif., 11th; Rudd, Eldon, Ariz., 4th;

Runnels, Harold, N. J., 2nd; Russo, Martin, Ill., 3rd; Santini, Jim, Nevada, AL; Sawyer, Harold, Mich., 5th; Schulze, Richard, Pa., 5th; Sebelius, Keith, Kansas, 1st; Sensenbrenner, F. James, Jr., Wis., 9th; Sharp, Philip R., Ind., 10th; Shelby, Richard, Ala., 7th; Shumway, Norman, Calif., 14th; Shuster, E. G. (Bud), Pa., 9th; Simon, Paul, Ill., 24th; Smith, Virginia, Nebr., 3rd; Snyder, Gene, Ky., 4th; Solomon, Gerald B., N. Y., 29th; Spence, Floyd, S. C., 2nd; St. Germain, Fernand, R. I., 1st; Stangeland, Arlan, Minn., 7th; Stanton, J. William, Ohio, 11th; Stenholm, Charles, Texas, 17th; Stockman, Dave, Mich., 4th; Stratton, Samuel S., N. Y., 28th; Stump, Bob, Ariz., 3rd; Symms, Steven, Idaho, 1st; Tauke, Thomas, Iowa, 2nd; Taylor, Gene, Mo., 7th; Thomas, William, Calif., 18th; Traxler, Bob, Mich., 8th; Trible, Paul S., Jr., Va., 1st; Vander Jagt, Guy, Mich., 9th; Volkmer, Harold, Mo., 9th; Walker, Robert, Pa., 16th; Wampler, William, Va., 9th; Whitehurst, G. William, Va., 2nd; Williams, Lyle, Ohio, 19th; Wilson, Bob, Calif., 41st; Winn, Larry, Jr., Kansas, 3rd; Wright, Jim, Texas, 12th; Wydler, John, N. Y., 5th; Wylie, Chalmers, Ohio, 15th; Yatron, Gus, Pa., 6th; Young, C. W. Bill, Fla., 6th; Young, Don, Alaska, AL; Young, Robert, Mo., 2nd; Zablocki, Clement, J., Wis., 4th; Zeferetti, Leo Co., N. Y., 15th.

Boren, David L., Okla.; Church, Frank, Idaho; Eagleton, Thomas F., Mo.; Exon, J. James, Nebr.; Garn, Jake, Utah; Hatch, Orrin G., Utah; Roth, William V., Jr., Del.; Humphrey, Gordon J., N. H.; Jepsen, Roger W., Iowa; Laxalt, Paul, Nev.; Lugar, Richard G., Ind.; McClure, James A., Idaho; Proxmire, William, Wis.; Stone, Richard (Dick), Fla.; Zorinsky, Edward, Nebr.[1]

1. Senator Jesse Helms, N. C., and Rep. Henry J. Hyde, Ill., 6th District, are not listed as *amici* solely because they are intervenors-appellees.

The *amici curiae*, as members of the Congress of the United States, are vested, by Article I, Section 1, of the Constitution, with all legislative powers granted in the Constitution. It is their sworn duty and common purpose to "support and defend" the Constitution of the United States.

Article I, Section 9, Clause 7 of the Constitution provides: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." The Congress is the sole law-making body under the Constitution. Clause 7 establishes the appropriations power in the Congress and the Congress alone.

In the present case, a judge of the United States District Court for the Eastern District of New York has held an appropriation act of the Congress unconstitutional and ordered the Congress to spend monies not appropriated.

It is the interest herein of the *amici curiae*, as members of the Congress, to protect the constitutional powers of that body over appropriations. Closely related to that interest, and of profound concern to the *amici*, is their interest in the preservation of that essential principle in the American Constitution known as the separation of powers.

The *amici* desire to point out to the Court that their interest in presenting this brief is not with respect to the question of abortion. The *amici* consist of members of the Congress who have voted for the Hyde Amendment (restricting the funding of abortions) and who have voted against that amendment.

The unique interests of the *amici* in protecting both the Congressional power of the purse and the principle of separation of powers have not been presented by other parties in this case. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT.

Independently of any other issue involved in this appeal is the primary concern of the members of Congress who are *amici* here, with respect to the separation of powers, the law-making power of the Congress, and the fact that the judgment of the court below violates the appropriations power of the Congress as given in Article I, Section 9, Clause 7 of the Constitution. The enactment known as the "Hyde Amendment" is an appropriations act according to long-established Congressional, executive and judicial understanding of the nature of appropriations. The district court erred in treating that enactment otherwise.

The appropriation and expenditure of tax funds is inherently a political question and therefore was explicitly left to that branch of our government which is closest to the people and most responsive to its needs and sensitivities. The frequent refusal of Congress to appropriate (as seen in riders to annual appropriations bills) points clearly to the inherently political nature of the appropriations process.

The case at bar involves an express refusal by the Congress to appropriate moneys in the exercise of an explicit constitutional grant of power. U. S. Const., art. I, § 9, cl. 7. This Court has never taken the position that the judiciary may oversee the appropriations process or set itself up as the ultimate arbiter of federal fiscal policy.

To so hold would embroil the judiciary in a process which would require constant and ongoing judicial balancing of competing political demands for limited financial resources. Such power was explicitly left to Congress by the founding fathers and any change should come pursuant to the Article V Amendment process, not by judicial decree.

ARGUMENT.

I. The District Court's Order Violates the Appropriations Clause of Article I.

The Constitution, Article I, Section 9, Clause 7, provides:

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

This language is plain and has been faithfully observed since its adoption. Until the instant case, it had governed the conduct of our government and marked an essential difference between the judicial and legislative branches.

The Court has before it a judicial order that challenges this section of the Constitution. That the order of the district court draws money from the Treasury, or attempts to draw it, can scarcely be denied. That, however, it appropriates money "by Law" must be denied. "By Law" refers to the legislative power, all of which is vested by Article I, Section 1, in the Congress. The district court's order, not, of course, being an appropriations bill, cannot draw money from the Treasury.

The district court's position can be paraphrased thus: "Congress appropriated the money for Medicaid with a condition which we find unconstitutional. We strike the condition. The appropriation already made by Congress now operates without the restriction which the condition had attached and funds the very activity for which the condition denied appropriations." That response, however, ignores the nature of the appropriations power, disregards the practice and the precedents of Congress, and

in the most fundamental way subverts the Constitution of the United States by making meaningless the reservation to Congress of the right to determine when "Money shall be drawn from the Treasury."

The Three Deficiencies of the District Court's Order.

1. That the Act before the Court is an appropriations act is beyond cavil. It is the annual Act appropriating money for the Departments of Labor and Health, Education and Welfare. Whether in the form of a regular appropriations act as in 1976 and 1978 or in the form of a Continuing Resolution as in 1977 and 1979, it supplies money. It originates in the House of Representatives. It is the object of deliberations by the Committee on Appropriations of the House. Like many other appropriations acts it says in so many words what it is appropriating money for and what it is not appropriating money for. In explicit terms it says it is not appropriating money to pay for abortions except in certain specific situations. Except for these situations, the Act says, "None of the funds contained in this act shall be used to perform abortions." The court below held the invalidated provision (the Hyde Amendment) to have effected a substantive change in the Medicaid Act, 42 U. S. C. § 1396, *et seq.* Slip op. 282-283. Accord, *Preterm, Inc. v. Dukakis,* 591 F. 2d 121 (1st Cir. 1979). While other courts have recently held to the contrary, *e.g., Doe v. Busbee,* 471 F. Supp. 1326 (N. D. Ga. 1979), *Hodgson v. Board of County Commissioners,* No. 4-78 Civ. 525 and No. 3-79 Civ. 56 (D. Minn. 1979), *Planned Parenthood Affiliates of Ohio v. Rhodes,* — F. Supp. — (S. D. Ohio 1979), *amici* consider the point irrelevant. Whatever its relationship to other enactments, the Hyde Amendment was part of an appropriation bill and an exercise of the appropriation power of the Congress.

"None of the funds contained in this act" is the language by which Congress has frequently refused to appropriate money for a specific purpose. For example, such language is used in 92 Stat. 1025 (1978), the general appropriations act for the State Department, to refuse to appropriate money for the promotion of the doctrine of one world government. The appropriations act for Labor and Health, Education and Welfare for that year uses the same language to refuse to appropriate money for any activities on behalf of any alien who is illegally in the country. 92 Stat. 1571 (1978). The same appropriations act uses the same language to refuse to appropriate money for a loan or salary to any individual at an institution of higher education who had used force to attempt to change the curriculum. 92 Stat. 1589 (1978).

Language of this kind is negative. It rejects a drawing from the Treasury. The negative cannot be converted by judicial magic into something positive. The refusal to draw cannot be made into a mandate to draw plus a condition.

The order of the court below treats "none of the funds contained in this act shall be used" as a condition. The wording is not the wording of a condition. Nothing in the Act, says, "Money is appropriated on condition that it not be spent for abortion." The only "conditions" in the act are the exceptions which specify the conditions under which abortion may be funded. If these exceptions are struck as too restrictive, there remains only the negative prohibition. Excising the exceptions which are stated leaves simply an absolute refusal to appropriate for abortion.

Under Rule XXI of the Rules of the House of Representatives, the language of refusal could not have been voted on in connection with an appropriations bill if the House had not deemed it to be language "retrenching

expenditure." CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, SEC. 835 (ed. Deschler, 1967). Substantially the present form of the retrenchment rule known as the "Holman Rule" had been adopted in 1876 and employed till 1885. It was revived in 1912 and has continued in effect until the present. *Ibid.* There is a substantial body of precedents indicating the House's understanding of the Rule. These precedents indicate that a limitation on the use of appropriated funds constitutes a decision not to appropriate for that purpose. See, *e.g.*, Ruling of the Chair, January 27, 1931 (limitation offered by Fiorello La Guardia). CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, 7.

In dozens of rulings on amendments offered under the Holman Rule, the House for over a century has taken the position that amendments so offered become, if accepted, part of the appropriations act itself. See, C. CANNON, *supra*, secs. 1431-1560 (1935). They are not considered separate legislation. If they are voted in, the appropriations act is limited by the words of the amendment. Consequently, when the Act says "None of the funds contanied in this act shall be used . . .," the Act no longer contains an appropriation for the purpose for which "none of the funds" can be used. Simply put, there are *no* funds appropriated for the proscribed purpose, and *none can become available unless Congress appropriates them anew.*

There can hardly be disagreement that it has always been understood that the formula used in a Holman Rule amendment is an *explicit* declaration that Congress is not appropriating for a use that might otherwise be thought to fall within the appropriation. After such an amendment has been accepted, no law exists by which an appropriation for this use has been made.

The district court's order, therefore, ignores the nature of the appropriations power. The order assumes that

there is some general sum appropriated with a variety of conditions attached which federal judges are free to alter if they think it constitutionally desirable. But the essence of the appropriations power is the ability to appropriate or not appropriate. Congress exercises that power when it says it is appropriating money and when it says it is not appropriating money. The power is fully and effectively exercised when Congress says it is not appropriating. Under our Constitution no federal judge is empowered to turn that negative into an affirmative.

2. The district court's order also disregards the practice and the precedents of Congress. For over a century, amendments of the Holman Rule type have been a central part of the appropriations process in Congress. The Democratic Study Group has observed that this kind of restriction has been used for a vast variety of purposes from controlling water projects to ending police activities in Vietnam and preventing the Central Intelligence Agency from destabilizing foreign governments. See DEMOCRATIC STUDY GROUP OF THE UNITED STATES, HOUSE OF REPRESENTATIVES, "THE APPROPRIATIONS RIDER CONTROVERSY," SPECIAL REPORT No. 95-12, February 14, 1978, p. 6. The explicit refusal to appropriate money for a specific purpose is an essential tool of democratic control of the business of bureaucratic government. To treat such explicit refusals to appropriate as conditions which a single federal judge may brush aside is to pay neither respect nor attention to the experience of a coordinate branch of government.

3. Finally, the district court's order subverts Article I, Section 9, of the Constitution. In an age marked by an immense increase in constitutional litigation it is remarkably easy to convert any disappointment on policy into a claim that a constitutional right has been infringed. If the court below is right, any group which has lost a legislative battle so completely that appropriations have

been explicitly denied them is free to rush into the federal courts—as the appellees did—obtain an injunction requiring the expenditure of money for the purpose for which Congress has explicitly refused to appropriate, and through the agency of a single federal judge achieve what the Constitution had committed to the care of Congress.

The district court's theory gives a power something like a line item veto to the federal judiciary. Given the ease with which policy disputes may be converted into constitutional questions, a loser in the legislative process can acquire a new forum by asking a federal judge to strike any specific refusal to appropriate, and on the theory of the court below the non-appropriation will become an appropriation. The power which a federal judge can thereby exercise is greater than the veto power of the President. The President can only reject entire acts, and he can never turn a non-appropriation into an appropriation. The district court's theory permits a federal judge to pick a specific provision, invalidate it, and by the very invalidation make appropriated what Congress had declined to appropriate.

Indeed if a federal court is empowered to change a refusal to appropriate into an appropriation because of a judge's constitutional misgivings, why not the President, too? The President is sworn to uphold the Constitution. If he deems a restriction in an appropriations act unconstitutional, why may he not, on the district court's theory, ignore the restriction and treat as appropriated what Congress had refused to appropriate? Neither in logic nor in practice could the Executive branch be asked to limit itself if the district court's view of the appropriation power is sound. Every federal district judge and the President and the President's appointees would have a charter to treat funds as appropriated in accord with their own understanding of the Constitution. If the integrity of the appropriations process as a power belonging to Congress is to be preserved, there can be no picking and choosing by President or court among provisions of an appropriations act. If an appropriations act is unconstitutional, let a court so say. But the appropriations power of Congress is gone if a court or the President may amend an appropriations act and turn a non-appropriation into an appropriation.

President Nixon, it may be recalled, picked and chose among provisions of an appropriations act and declared that he was impounding certain appropriated funds. This impoundment of over eight billion dollars was characterized as exercise of "a line item veto," and legislation was soon introduced to correct it. See 119 CONG. REC. 5086 (1973). It was noted that the President's action was contrary to the advice he had received from the Assistant Attorney General in charge of the Office of Legal Counsel. *Ibid.* It was observed that the President's action hurt "America's most disadvantaged groups" and at the same time destroyed the separation of powers. The President, it was pointed out, "is not empowered to sign the bill and then substitute an amount of his own choosing for that specified in the law." *Id.* at 10160. This invasion by President Nixon of the appropriations power was characterized as an "abuse of his powers" and given as an example of how President Nixon "systematically arrogated to himself the powers of Congress." See Additional Views of Rep. Holtzman, REPORT OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, 93rd Cong., 2nd Sess. Report No. 93-1305 (1974) p. 301; see also Additional Views of Mr. Conyers. *Id.* at p. 291. But what President Nixon did was far less than the district court did when it not only exercised a line item veto but turned a negative into an affirmative.

This is not a case like the *School Desegregation Cases* where the federal judiciary is enforcing the paramount law of the land against individual States and where, absent Eleventh Amendment problems, the Constitution poses no barrier to this Court's requiring the States to provide a remedy. Even in such a case a federal court order may have a "profoundly disturbing" financial impact, Powell, J., concurring in judgment, *Milliken v. Bradley*, 433 U. S. 267, 298, n. 3 (1977). This is a case where there is an express constitutional provision protecting a co-ordinate branch of the federal government.

The Extent of the Challenge to the Constitutional Authority of Congress.

This issue is not limited to the abortion question; the inviolable and exclusive power of the purse is one that touches on all of what Congress does. To tamper with that exclusive power is to tamper with the very essence of constitutional, representative government. Once done, Congress could become a mere bookkeeper for a judiciary, or even executive, that has arrogated unto itself a power denied it by the framers of our system.

So clearly has this been understood that some of the harshest language ever used to describe a violation of the separation of powers has been used with respect to this problem. Montesquieu wrote:

> "Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression."

THE SPIRIT OF THE LAWS, 154 (6th ed. 1792, T. Nugent, trans.).

Madison was even more direct on the proper view of the appropriations power in his Federalist Paper No. 58:

> "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

THE FEDERALIST No. 58 at 380 (Modern Library ed.) (J. Madison). Hamilton was equally adamant in his Federalist Paper No. 78:

> "The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.

Id. at 504. Congress' exclusive power of the purse, therefore, has its roots in clear and unambiguous history.

With unblemished consistency this Court, and the federal courts in general have understood and respected

this very basic separation of powers between Congress and Court. Whenever the issue has been raised this Court has concluded that an appropriation by Congress is required before moneys may be drawn from the federal Treasury. *Knote v. United States,* 95 U. S. 149 (1877); *Austin v. United States,* 155 U. S. 417 (1894); *Hart v. United States,* 118 U. S. 62 (1868); *Reeside v. Walker,* 52 U. S. (11 How.) 623 (1850). And see *Cincinnati Soap Co. v. United States,* 301 U. S. 308 (1937); *United States v. Lovett,* 328 U. S. 303 (1946).

The Civil War gave this Court several opportunities to confront the appropriations question. After that war numerous controversies arose over Congressional attempts to limit the payment of the claims of persons who had aided the Rebellion, but who had subsequently received Executive pardons. In *Knote v. United States, supra,* President Johnson pardoned petitioner Knote for his part in the Civil War and relieved him of all disabilities and penalties attaching to his rebellion. Pursuant to that pardon Knote sought to recover the proceeds of his property previously condemned and sold under an earlier confiscation act. At the time of his claim the proceeds had already been paid into the U. S. Treasury.

Counsel for Knote raised the issue squarely: "The proceeds of the sale of the claimants' property are held by the government. . . . His right to them under the pardon imposes legal obligations on the government, and *may be judically enforced.*" *Knote v. Untied States, supra,* at 151 (emphasis added) This Court's reply was equally clear: Undoubtedly Knote had a right to the restoration of his property, but ". . . if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only *be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.*" *Id.* at 154 (emphasis supplied).

Contrary to the argument of the petitioner's counsel, this Court held that no judicial remedy could draw funds from the Treasury; such was beyond the control of the Court: *See also, Austin v. United States,* 155 U. S. 417 (1894); *United States v. Klein,* 13 Wall. (80 U. S.) 128 (1872) and *Hart v. United States,* 118 U. S. 62 (1886).

In *Reeside v. Walker, supra,* the estate of James Reeside sought and won a set-off of its claims against those of the United States. The jury found that the government was, in fact, indebted in the amount of $188,496.06. In an attempt "[t]o save future expense and litigation in [the] case, with a view to obtain[ing] the desired judgment" this Court articulated the clear and unambiguous rule that a court may not order the Treasury to pay out unappropriated moneys:

"No officer, however high, not even the President, much less a secretary of the treasury or treasurer is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the treasury department, the plaintiff would be as far from having a claim on the secretary or treasurer to pay it as now. The difficulty in the way is the want of any appropriation by congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by congress. See Constitution, Art. I, § 9, I Stats. at Large, 15.

"However much money may be in the treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

> "Hence, the petitioner should have presented her claim on the United States to congress, and prayed for an appropriation to pay it. If congress after that make such an appropriation, the treasury can, and doubtless will, discharge the claim without any *mandamus*. But without such an appropriation it cannot and should not be paid by the treasury, whether the claim is by a verdict or judgment, or without either, and no *mandamus* or other remedy lies against any officer of the treasury department, in a case situated like this, where no appropriation to pay it has been made. 52 U. S. (11 How.) 626-28 (emphasis by the Court).

Thus, even in the face of a binding obligation or judgment, or an unconstitutional withholding of funds in the Treasury, no court may order the funds to be paid where not authorized by Congress. *Stitzel-Weller Distillery v. Wickard,* 118 F. 2d 19 (1941); *Collins v. United States,* 15 Ct. Cl. 22 (1878); *Doe v. Matthews,* 420 F. Supp. 865 (D. N. J. 1976). And see *Cincinnati Soap Co. v. United States,* 301 U. S. 308 (1937); *Spaulding v. Douglas Aircraft Co., Inc.,* 60 F. Supp. 985 (S. D. Cal. 1945). In the case at bar, appellees are requesting precisely such relief since they seek not merely a declaration of rights, but an order to spend funds expressly not appropriated.

Again, in *United States v. Lovett, supra,* this Court and the Court of Claims had occasion to apply the rule against court-ordered appropriations. *Lovett* was a challenge to an appropriations measure that provided that certain named government employees not be paid their salaries unless Congress confirmed their continued employment. The three named individuals continued to work despite the Congressional act and sued for their compensation in the Court of Claims. That court decided that the claimants were entitled to the money, but did not

entertain the illusion that it could order the Treasury to pay, or the Congress to appropriate, the funds:

> "Congress, by enacting Section 304, did not foreclose itself from thereafter appropriating for the payment of these salaries. Congress even now *may* appropriate, and authorize a selected disbursing agency to pay them. Claims therefor, presented to Congress, *may* be satisfied by an appropriation to pay them, as claims. Judgments, recovered here, *may* be satisfied by any appropriation out of which the judgments *may* be by Act of Congress, payable."

Lovett v. United States, 66 F. Supp. 142, 147 (Ct. Cl. 1945) *affirmed on other grounds, United States v. Lovett,* 328 U. S. 303 (1946). (Emphasis supplied.) The order of the Court of Claims that the plaintiffs were "entitled to recover" specific dollar amounts was the authorization of payment; but as with the usual congressional authorization, an appropriations act was necessary to provide the money.[2]

This Court affirmed the Court of Claims and held the salary prohibition an unconstitutional bill of attainder. But again, no order was made to appropriate or pay the funds. That determination was properly left to Congress. This Court did not reach back to the appropriation, strip it of the salary prohibition, and order payment as though the funds had been appropriated and illegally constrained.

In Congress there was at first disinclination to provide the funds to meet this Court's judgment. The most outspoken congressman in favor of honoring the judgment admitted that it was within the power of Congress to provide the money or not. Congressman Javits, for example, urged that the Deficiency Subcommittee "again consider this matter" 93 CONG. REC. 2977 (1947). Congressman Gwynne observed: "Of course we have the power to refuse

2. See Rule XXI, CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, ed. Deschler, sec. 837.

to appropriate the money" while urging that it was "duty of Congress to vote the money." *Id.* at 2990. Congressman John F. Kennedy suggested that it was "a question of whether the House should honor a decision of the Supreme Court." *Id.* at 2989; and he went on to say: "If because we have the power in this chamber to do so, we should hold back part of this money and not honor the decision of the Supreme Court, we would be breaking down that division [of the three powers] . . . this claim should be honored." *Id.* at 2990. Congressman Keating, also speaking in favor of providing money to satisfy the judgment, observed as to the successful plaintiffs: "The only way they can translate their piece of paper called a judgment into cash in hand is through an appropriation made by this Congress." *Id.* at 2990. The plaintiffs would never have been compensated had not a nearly evenly divided House—after long debate—subsequently voted 99-98 to pay the amount due under the decision. 93 CONG. REC. 2973-75, 2977, 2987-91 (1947).

The long-standing respect for the appropriation power evidenced in the opinions of this Court has been similarly reflected in lower court decisions. On the very issue raised by the case at bar one district court judge reached the exact opposite conclusion of the court below. In *Doe v. Matthews,* 420 F. Supp. 865 (D. N. J. 1976) Judge Buinno faced a challenge to the Hyde Amendment; his opinion reached the heart of the issue:

> "[N]one of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision in the United States Constitution, Art. I § 9 cl. 7 that:
>
> > 'No money shall be drawn from the Treasury but in consequence of appropriations made by law'
>
> Neither the complaint, the moving papers nor the initial brief discusses this question. Yet it cannot be avoided because, on the record before the Court, the Congress simply has not appropriated any moneys for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions." *Id.* at 870.

Judge Buinno has stated well the rule that must govern this case. No court has ever done what the court below has done.

The Sources of the District Court's Error.

When the district court first ruled in the instant case, twenty-two days after the law went into effect in 1976, and ordered the Secretary of HEW to pay for abortions throughout the country contrary to the appropriations act, the court was under the impression that it had a precedent in the *Lovett* case. See opinion of Dooling, J., in *McRae v. Matthews,* 421 F. Supp. 533, 540-541 (E. D. N. Y. 1976). Plainly, however, the court misread *Lovett* and reached a result directly counter to the self-restraint exercised by the judiciary in *Lovett.* Ruling again in the instant case almost four years later, the court below has put its chief reliance on a very recent decision of this Court which, arising after his initial ruling, seems now to it to justify its extraordinary action in October, 1976, and its return to it in January, 1980. The district court has invoked *Califano v. Wescott,* — U. S. —, 61 L. Ed. 2d 382 (1979), decided by a vote of five to four. The court has, however, ignored two vital differences between this recent case and the instant case: First, in *Wescott,* the appropriations issue was not argued to this Court. As the Court observed, the federal appellant did "not question the relief ordered by the District Court." *Id.* at 387 (L. Ed. 2d). Consequently *Wescott* cannot be construed as having disregarded a section of the Constitution and as a departure from an old and settled line of decisions. Second, in the act there under consideration there had been no exercise

by Congress of the *appropriations* power. Congress had restricted certain benefits to unemployed fathers. It had not refused to appropriate money for unemployed mothers. It had inserted a broad severability clause, 42 U. S. C. sec. 1303. A single federal judge was not commanding, where Congress had said "No appropriation", that an appropriation be made.[3]

The district court's extraordinary action is based not only on its misreading of *Lovett* and *Wescott*, but also on its belief, disclosed in its opinion, that the ability of a federal judge to declare a portion of an appropriations act unconstitutional is "the inescapable responsibility of the judiciary." (Slip op. 291-292). This confuses the power of judicial review with the power to appropriate money.

The court below goes on to cite five cases—*The Abortion Cases* (*Wade* and *Bolton*) and *The Abortion Funding Cases* (*Beal, Maher* and *Poelker*)—to show that the federal courts can pronounce on the constitutionality of law dealing with abortion. While no one would deny that, none of the cases cited has any bearing on the power of a single federal judge to appropriate money or draw it from the Treasury of the United States.

In the court's opinion appears to lurk the fear that if a federal judge cannot control a Congressional appropriation, Congress will appropriate money for all sorts of unconstitutional purposes without check or balance from the other branches of government. But as *Lovett* makes clear, if an appropriations act does offend against an express command of the Constitution, there is adequate check and balance in the power of the judiciary to declare the act

3. The District Court had also invoked the teaching of Mr. Justice Harlan, concurring in *Welsh v. United States*, 398 U. S. 333 (1970), on a court's power to extend the exemptions of a statute. But neither Mr. Justice Harlan in *Welsh*, a case involving exemptions for conscientious objectors, nor this Court in *Wescott*, a case involving an authorization statute with a severability clause, had addressed the appropriations power or contemplated a challenge to the exercise of that power by Congress.

unconstitutional. What the Constitution forbids in Article I, Section 9, is not judicial review but judicial intrusion into the legislative powers and judicial usurpation of the power of the purse.

If this Court should find that a provision of the Appropriations Act for the Departments of Labor and HEW transgresses a command of the Constitution, the Court is free to declare that provision of the Act unconstitutional, leaving Congress the option of not funding these departments or complying with the Court's criteria of constitutionality. Such a remedy, while harsh, is far from vain. It is what in actuality is the appellees' remedy if they are correct in their claim that the appropriations act is unconstitutional. What it has not power to do is to make a nonexistent appropriation into an appropriation.

The judicial power of injunctive relief, exercised negatively, goes to the very limit of encroachment on the appropriations power yet still does not convert a nonappropriation into an appropriation; but injunctive relief, exercised selectively and positively as in the instant case, creates an appropriation where none was intended, where indeed an appropriation was denied. The power is a great power which, no doubt, will be exercised sparingly because of the possibility of catastrophic ramifications; the denied power is a great power which, as in this case, may be exercised mistakenly and must inevitably substitute judges for legislators as the holders of the power of the purse.

But the question may then arise, whether a declaration of unconstitutionality without an order of payment is an illusory remedy. Clearly, it is not. If an act of Congress is truly so extreme that it violates the Constitution, and this Court exercises its power to so indicate, it cannot be supposed that Congress would be insensitive to such teaching of this Court. But it is not within the constitutional power of this Court to compel Congress to appropriate where it chooses not to appropriate.

The "inescapable responsibility of the judiciary" is to exercise the judicial responsibility entrusted to judges by Article III of the Constitution. It is ironic that a district court, invading the power of Congress to appropriate, should defend its action as observing what "is intrinsic to the separation of powers." (Slip op., 292). What is intrinsic to the separation of powers is that each branch of government exercise responsibly the power entrusted to it by the Constitution. Each branch, as this Court has stated, "must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others," but the basic powers of each branch, such as the veto power of the Executive, cannot be shared. *United States v. Nixon,* 418 U. S. 683, 704 (1974). The power to appropriate is unshareable.

II. The District Court Erred in Not Dismissing the Action as Nonjusticiable in That It Presented a Political Question.

In the first part of this brief, *amici* have assumed, *arguendo,* that *U. S. v. Lovett, supra,* applies, and that this therefore was the kind of case in which judicial review of an appropriations act is in order. In this second part of the brief, *amici* put aside that assumption. *U. S. v. Lovett* dealt with a rare kind of appropriations act—an act of Congress found to be in violation of a specific provision of the Constitution and in violation of the rights of three named persons. Like a court order, that act operated upon those persons immediately and directly, and, as the court held, without trial and unjustly, to divest them of individual rights. The act there in question was very different from the appropriations act now before this Court. For the reasons stated below, *amici* submit that *U. S. v. Lovett* does not govern here, and that the issue presented in this case, because it presents a political question, is nonjusticiable.

The "political question" doctrine has long informed this Court's decisions on the justiciability *vel non* of certain constitutional issues. The most thorough and oft-cited description of this doctrine is that of Mr. Justice Brennan in *Baker v. Carr,* 369 U. S. 186 (1962). The essence of the doctrine is "the relationship between the judiciary and the coordinate branches of the Federal Government. . ." *Id.* at 210. Further, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." *Ibid.* Justice Brennan defined the doctrine in the following language:

> "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Id. at 217. While the doctrine requires that only "one of these formulations [be] inextricable from the case at bar" in order to effect a "dismissal for nonjusticiability on the ground of a political question's presence", the instant case involves five of these criteria.

The view of the district court that this case is an act ruled by *U. S. v. Lovett, supra,* is plainly erroneous. That case concerned an extraordinary provision refusing to appropriate salaries for three named persons, an act amount-

ing to a bill of attainder. Like a court order it operated to punish these persons. The appropriation in question there involved standards entirely manageable by a court. It did not involve, as does this case, a broad issue of social policy on which the electorate and the elected members of Congress have repeatedly expressed themselves.

1. Textual Commitment of the Power to Congress.

The appropriations clause of the Constitution is found under Article I thereof which defines legislative powers. The appropriations power is textually committed to Congress. In addition, the statement in that clause, "made by Law", plainly refers to appropriations made by and through the prescribed Congressional procedures. Article I, Section 1, vests all law-making powers ("[a]ll legislative powers") in the Congress. Consequently, there is no clearer statement in the Constitution that a power is textually committed to a coequal branch. It is similar to the statement of Article I, Section 8, Clause 16 which vests in Congress the power "[t]o provide for organizing, and disciplining, the militia. . ."

In *Gilligan v. Morgan*, 413 U. S. 1 (1973) this Court held that this "militia power" was exclusive to Congress and that the Court could not, as plaintiffs asked, evaluate the training of the Ohio National Guard to see whether it was constitutionally deficient under the due process clause. This Court's reasons for finding nonjusticiability in *Gilligan* are similar to the reasons why the action brought by the plaintiffs below should have been dismissed as nonjusticiable:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."

Id. at 10. This Court went on to say that such issues must remain "[t]he ultimate responsibility [of] branches of the government which are periodically subject to electoral accountability." *Ibid.*

Those words seem tailored for the instant case. The judicial branch has been consciously excluded from the appropriation decision both because it lacks competence in that area, and because such decisions *must* be made by popularly elected representatives who can reflect the will of their constituencies.

2. Lack of Judicially Manageable Standards.

Once it should be held that the appropriations power may be usurped by the courts, the use of that power will predictably not be limited to abortions. A multitude of financial and budgetary questions will be laid at the courthouse door. Every loser in the representative processes will seek a judicial appropriation for his program. Consequently, the courts will consistently be asked to allocate scarce financial resources—allocations that should be made by the elected representatives of the people of the United States.

Consider the examples cited earlier from appropriations acts of 1978. The appropriations act for the State Department says that "None of the funds appropriated in this title shall be used . . . for the promotion, direct or indirect, of the principle or doctrine of one world government," 92 Stat. 1025 (1978). Surely the advocates of one world government have a right of free speech guaranteed by the First Amendment which is no whit inferior to the right to free exercise of religion which the court below has made one basis for its order commanding that public money be spent for abortions. (Slip op. 326-328.) Under

the holding of the district court, an advocate of one world government may now challenge the constitutionality of the State Department appropriations act because it denies him money to support his constitutional right of speech.

Or consider the language of the Labor-HEW Appropriations Act cited earlier, which operates to deny federal unemployment benefits to an alien illegally in the country. 92 Stat. 1571 (1978). As an alien has certain constitutional rights, he may now, under the teaching of the court below, litigate to strike such a provision and collect his unemployment pay on the ground that denial of appropriations for this purpose is a denial to him of the very means of subsistence.

Or take the language of the same Act forbidding loan or salary to a student who after 1969 used force to attempt to change college policy on curricula. 92 Stat. 1589. No doubt such a student has a case to make that such discrimination is a penalty imposed without due process of law. Is he free, it may be asked, to litigate his claim and succeed in getting his benefit if somewhere in this country he finds a federal judge who thinks Congress' refusal to appropriate was unconstitutional?

There are as many differences and distinctions drawn in appropriations acts as there are in tax laws. The very recent study by Fischer on the authorization-appropriations process [4] provides a multitude of examples of the essentially political process of appropriating and refusing to appropriate. Unless this Court is to command uniformity of treatment in the name of Due Process or Equal Protection, each distinction and each difference can be turned so as to present a constitutional difficulty. This Court and the lower federal courts will have to enter wholeheartedly into the appropriations process and weigh and determine a vast variety of cases.

4. L. Fisher, The Authorization-Appropriations Process: Formal Rules and Informal Practices (Congressional Research Service, Library of Congress, 1979).

3. Impossibility of Deciding Without a Policy Determination of a Kind Clearly for Nonjudicial Discretion.

Nothing can be clearer than the fundamentally legislative nature of appropriations decisions. Who shall be funded and who shall not is at the heart of the legislative process. Any judicial appropriation for abortions requires an initial policy decision that something else not be funded. Any judicial order to expend money for abortion puts the federal judiciary squarely in the legislative area. See J. Noonan, A Private Choice, 112-117 (1979).

4. Expression of Lack of Respect Due a Coordinate Branch of Government.

Almost a century ago an acute observer of our institutions, James Bryce, wrote: "There remains the power which in free countries has long been regarded as the citadel of parliamentary supremacy, the power of the purse. Congress has the sole right of raising money and appropriating it to the service of the state." Bryce, The American Commonwealth, 158 (Macmillan, 1905). It is this citadel which the district court's order has subverted, and this Court is asked to ratify that subversion.

The Majority Leader of the House, Congressman Jim Wright, an *amicus* here, has expressed the deep concern the House has felt at this sudden challenge to its basic power:

> "Whatever one's feeling may be as to the social ethics involved, surely the right of Congress to enact a specific limitation on the use of tax moneys for any such purpose is a right long established. It is a right without which Congress could not perform its duty to the American taxpayer.

> "That right is indispensable to the legislative branch in carrying out its constitutional responsibility, and I trust that the Supreme Court will speedily and decisively reaffirm that right in this case."

126 CONG. REC. 1062 (1980). Abortion aside, the lower court ruling treats Congress as the stepchild in our constitutional system.

5. Unusual Need for Unquestioning Adherence to a Political Decision Already Made.

Here again the words of Madison are of value: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST No. 58, at 380 (Mod. Lib. ed.) (J. Madison). The amount of money affected by the district court's order may be estimated, on the basis of earlier experience, as at least $88 million (see *The Washington Post*, February 20, 1980, A 14). If this money is used for the purpose rejected by Congress and required by the court below, less money will be available for needs for which Congress did appropriate. It does not seem to lie within the competence of the judiciary to determine the seriousness of the needs Congress sought to meet—no data on them has been presented in this process. Nor does the judiciary appear to have the competence to determine what needs will then go unmet or to forecast the response of Congress to a judicial redistribution of federal funds.[5] There is an unusual need, therefore, for the judiciary to adhere to the political decision already made as to the appropriation.

A more obvious example of a political question is difficult to imagine. Not one, but five, of Mr. Justice Brennan's criteria are met in the case at bar. Overriding all is his admonition that primarily the doctrine is concerned with the separation of powers. A judicial usurpation of the appropriations power is no less a threat to the separation of powers than would be a usurpation of the militia power, or the war power, or the taxing power. These are simply not powers that were intended for the judiciary. They were intended for the people's most immediate representatives: the Congress of the United States.

The very first words of Article I of our Constitution are: "All Legislative Powers herein granted shall be vested in a Congress of the United States. . ." A matter that has been hotly contested within each body of the Congress and between the two bodies, a matter which has been an issue in municipal and state and national legislatures is indisputably legislative, and it is difficult to believe that any issue could be more political. No doubt members of the federal judiciary have strong views as to what the right outcome of the political contest should be. A number of these judges have not concealed their opinions. Members of the judiciary are called, not to further the political cause they think is right, but to respect the foundations of our government of separate and limited powers, of which the power of the purse is democratically entrusted to the Congress.

5 The statement of Mr. Justice Stewart is apropos:

> "We do not decide today that the Maryland regulation [limiting total amounts allotted to families with dependent children under Title IV of the Social Security Act] is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *Dandridge v. Williams*, 397 U. S. 471, 487 (1970).

CONCLUSION.

For all of the foregoing reasons, it is respectfully requested that the judgment of the district court, violating Article I, Section 9, Clause 7 of the Constitution, violating the principle of separation of powers, and representing an exercise of jurisdiction to resolve a political question contrary to Article III, be reversed.

Respectfully submitted,

JOHN T. NOONAN, JR.,
474 Boalt Hall,
University of California
School of Law,
Berkeley, CA 94720

BASILE J. UDDO,
3715 Vincennes Place,
New Orleans, LA 70125

WILLIAM B. BALL,
BALL & SKELLY,
511 North Second Street,
P. O. Box 1108,
Harrisburg, PA 17108
Attorneys for Amici Curiae.

March 18, 1980

CERTIFICATE OF SERVICE.

I hereby certify that on this 18th day of March, 1980, three copies of the Brief *Amicus Curiae* were mailed, postage prepaid, to Wade H. McCree, Jr., Esq., Solicitor General of the United States, Department of Justice, Constitution Avenue between Ninth and Tenth Streets, N. W., Washington, D. C. 20530, Richard P. Caro, Esq., 225 Cadman Plaza East, Brooklyn, N. Y. 11201, counsel to appellee, Rhonda Copelon, Esq., 853 Broadway, New York, N. Y. 10016, Janet Benshoof, Esq., 22 East 40th Street, New York, N. Y. 10016, Sylvia A. Law, Esq., 40 Washington Square South, New York, N. Y. 10012, Jill Laurie Goodman, Esq., 22 East 40th Street, New York, N. Y. 10012, Nadine Taub, Esq., 14 Washington Street, Newark, N. J. 07102, counsel for appellee women and medical doctors and for appellee Women's Division of the Board of Global Ministries of the United Methodist Church, Harriet F. Pilpel, Esq., 437 Madison Avenue, New York, N. Y. 10022, counsel for appellee Planned Parenthood of NYC, Inc., Ellen Kramer Sawyer, Esq., 125 Worth Street, #523, New York, N. Y. 10013, counsel for appellee New York City Health and Hospital Corporation, Patrick A Trueman, Esq., AUL Legal Defense Fund, 230 North Michigan Avenue, Chicago, Ill. 60601, counsel to intervenors-appellees. I further certify that all parties required to be served have been served.

WILLIAM B. BALL,
BALL & SKELLY,
511 N. Second Street,
Harrisburg, PA 17108

Supreme Court, U.S.
FILED
MAR 19 1980
ALEXANDER L. STEVAS, CLERK

No. 79-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

PATRICIA A. HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant

v.

CORA McRAE, ET AL.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE AMERICAN ETHICAL UNION; AMERICAN HUMANIST ASSOCIATION; BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH; CATHOLICS FOR A FREE CHOICE; CHURCH OF THE BRETHREN; DEPARTMENT OF CHURCH WOMEN OF THE DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); NATIONAL FEDERATION OF TEMPLE SISTERHOODS; NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; UNION OF AMERICAN HEBREW CONGREGATIONS; YOUNG WOMEN'S CHRISTIAN ASSOCIATION.

LEO PFEFFER
191 Willoughby Street
Brooklyn, NY 11201
(212) 855-1701
Attorney for Amici Curiae

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI* 1

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Introductory 0

A. Position of the *Amici* 4
B. Decision of the District Court 7

II. Religious Tests for Public Benefits 8

III. Establishment of Religion 11

A. Introductory 11
B. The Everson Test 12
C. The Purpose-Effect Entanglement Test 14

1. Purpose 14
2. Primary Effect 17
3. Entanglement with Religion 20

IV. Free Exercise of Religion 23

TABLE OF AUTHORITIES

Page

Cases

Abington Township School District v. *Schempp*,
347 U.S. 203 (1963) 12

Anderson v. *Laird*,
466 F.2d 283 [D.C. Cir. 1972] 10

Application of Georgetown College,
331 F.2d 1000, *certiorari denied*
377 U.S. 585 (1964)..... 24

Bigelou v. *Virginia*,
421 U.S. 809 (1975) 19

Birnel v. *Town of Firecrest*,
361 U.S. 10 (1959) 24

Brown v. *Board of Education*,
347 U.S. 483 (1954) 6

Eisenstadt v. *Baird*,
405 U.S. 438 (1972) 20

Epperson v. *Arkansas*,
393 U.S. 97 (1968) 12, 15, 16

Everson v. *Board of Education*,
330 U.S. 1 (1947) 3, 11

Griswold v. *Connecticut*,
381 U.S. 479 (1965) 20

Kedroff v. *St. Nicholas Cathedral*,
344 U.S. 94 (1952) 23

Lemon v. *Kurtzman*,
403 U.S.602 (1971) 21

Page

McGowan v. *Maryland*,
366 U.S. 420 (1961) 5, 15

Plessy v. *Ferguson*,
163 U.S. 537 (1896) 6

Roberts v. *City of Boston*,
59 Mass. 198 (1849) 6

Roe v. *Wade*,
410 U.S. 113 (1973) 5, 6, 17

Torcaso v. *Watkins*,
367 U.S. 488 (1961) 9, 23

Transworld Airlines v. *Hardison*,
432 U.S. 63 (1971) 23

United States v. *Seeger*,
380 U.S. 163 (1965) 25

United States v. *Vuitch*,
402 U.S. 62, (1971) 18

Walz v. *Tax Commission*,
397 U.S. 664 (1970) 23

West Virginia Board of Education v. *Barnette*,
319 U.S. 624 (1943) 23

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 23

Wolman v. *Walter*,
397 U.S. 664 (1977) 3, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA A. HARRIS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

Appellant

v.

CORA McRAE, ET AL.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE AMERICAN ETHICAL UNION; AMERICAN HUMANIST ASSOCIATION; BOARD OF CHURCH AND SOCIETY, UNITED METHODIST CHURCH; CATHOLICS FOR A FREE CHOICE; CHURCH OF THE BRETHREN; DEPARTMENT OF CHURCH WOMEN OF THE DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST); NATIONAL FEDERATION OF TEMPLE SISTERHOODS; NATIONAL WOMEN'S CONFERENCE OF THE AMERICAN ETHICAL UNION; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; UNION OF AMERICAN HEBREW CONGREGATIONS; YOUNG WOMEN'S CHRISTIAN ASSOCIATION.

INTEREST OF THE AMICI

The organizations joining in this brief neither favor nor oppose abortion, although among the millions of Americans who comprise their memberships there are many whose religious conscience calls for access to abortion for all women regardless of economic circumstances. All the organizations share in the belief that the decision either to undergo or forego abortion must be personal and

uncoerced by government. They further believe that the unitary principle of church-state separation and religious freedom forbids government to impose upon all the theology of one or more sects. Their religious conscience is offended by a law which makes the abortion procedure fully available to women who are fortunately able to pay for them but, realistically, denies it to the poor and underprivileged when needed to protect the health and welfare of themselves and their families. Finally, they are unable to accept, as consistent with the concept of a democratic society, a system of law under which churches whose views on the sinfulness of abortion, whether or not shared by the majority of Americans, can utilize statutory exceptions to achieve by force of poverty their theological ends among the economically disadvantaged.

For these reasons they respectfully submit this brief *amici curiae.*

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed to the single question whether consistent with the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, the federal or state governments can deny Medicaid benefits for abortions where a paramount purpose of the denial is to prevent abortions by reason of the fact that they are condemned as sinful by particular religious groups.

Although the *amici* do not address themselves to the question whether such denial can be sanctioned under the Equal Protection Clause of the Fourteenth Amendment as applicable to the states and the Due Process Clause of the Fifth Amendment as applicable to the federal government, they take this opportunity to express to the Court their opinion that the District Court was correct in answering that question in the negative.

SUMMARY OF ARGUMENT

Even in the absence of the First Amendment prohibitions, the spirit if not the letter of the provision in Article VI of the Constitution forbidding religious tests for public office militates against the denial of governmentally financed access to abortion procedures on the part of the economically disadvantaged solely by reason of the religious objections to the procedure on the part of one or more churches. Independent thereof, the statute challenged violates both the Establishment and Free Exercise Clauses of the First Amendment. It violates the former under the test set forth in *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947) and other cases, because it constitutes a law which prefers those religions that forbid abortion over those which do not, and injures women who do not profess a religious belief forbidding abortion by withholding from them a government benefit available to others. It further violates the Establishment Clause as defined in *Wolman* v. *Walter,* 397 U.S. 664 (1977), and many other cases, in that its purpose, as abundantly proved by its history, is religious rather than secular, and its effect is to advance religions which forbid abortions and to inhibit religions which do not. Finally, the challenged law violates the Free Exercise Clause because it imposes the inhibitions of those religions that deem abortions sinful upon persons whose religious beliefs do not exclude abortion procedures, and particularly upon those who believe, therefore that the poor must have equal access to the procedure to mitigate against the tragedies which may result from unplanned pregnancies.

I. Introductory

A. *Position of the Amici*

It is the position of the *amici* that the challenged statute, insofar as it excludes abortion procedures from its benefits, is basically a religious law and is thus not only inconsistent with American traditions and values, but is also unacceptable under a constitution that forbids laws respecting an establishment of religion or prohibiting its free exercise. The law challenged here imposed governmental sanctions, in the form of deprivation of access to the benefits of the Medicaid programs (Title XIX of the Social Security Act), for violation of a religious mandate that equates abortions, from moment of conception, and murder. Basically what the law does is to give governmental effect to the dogma and doctrine of the churches and religions which espouse that view.

The Roman Catholic Church is the largest religious denomination which forbids abortion, but it is, of course, not the only one. The voluminous record in this case and other sources indicate that there are other religious groups, such as the Missouri Synod of the Lutheran Church, the Church of Jesus Christ of the Latter Day Saints (popularly known as the Mormon Church), Orthodox Jewish congregations, and various Protestant Fundamentalist sects which share in the doctrine that forbids abortion, although perhaps not to the extreme of forbidding the procedure even where necessary to preserve the life of the woman.

The religions that oppose abortion demand its exclusion from the coverage of the Medicaid program even in respect to women who do not equate abortion with

murder, do not consider it sinful, and to the contrary, deem it an appropriate and sometimes necessary response to an unplanned and health-threatening pregnancy. It is our view that only the intervention by these religions in the law-making process realistically accounts for the exclusion of abortion procedures from the program. Were they to abrogate their theological condemnation of the procedures even if only *de facto* (as in the case of contraceptive birth control), or, without altering their position on abortion, would withdraw their opposition to Medicaid coverage, it can hardly be doubted that the governments, state and federal, would include the procedure.

We recognize, of course, that the acceptance by most faiths of abortion as a licit means to avoid the tragedies which may be caused by an unplanned pregnancy is a comparatively recent development, necessitated by the failure of contraception to achieve that purpose. To the extent that the state laws making abortion a crime reflected religious values when they were adopted, those values were Protestant no less than Catholic, and Jewish no less than Christian or Islamic. But it is the obligation of the courts to adjudge constitutionality on the basis of present, not past reality. In *McGowan* v. *Maryland* and the other Sunday law Cases, 366 U.S. 420 *et. seq.* (1961) the Court recognized that the challenged statutes reflected religious values when they were adopted but it nevertheless upheld their constitutionality on the basis of the current, rather than past, reality that their purpose had in time become secular.

What we have in the present situation is the converse. As this Court observed in *Roe* v. *Wade,* 410 U.S. 113, at 139 [1973], abortion laws like many other criminal statutes, represented, when originally enacted, secular values more so than religious ones. The record in this case establishes what is so widely known and accepted that it

could well be judicially noticed: today's opposition to abortion, including the effort to enact a constitutional amendment nullifying *Roe* v. *Wade* and the instant restriction on governmental financing of the procedure for the economically disadvantaged, reflect religious rather than secular values.

Determination of constitutionality on the basis of the realities of today rather than of yesteryear is by no means unprecedented in American constitutional history. Acceptance of racial segregation in public schools as not inconsistent with the substance of the 13th and 14th Amendments was widespread if not universal throughout the nation, even in such abolitionist states as Massachusetts. See, *Roberts* v. *City of Boston,* 59 Mass. 198 (1849); *Plessy* v. *Ferguson,* 163 U.S. 537 (1896). That fact, however, did not foreclose a unanimous decision to the contrary on the part of the Court, handed down later in *Brown* v. *Board of Education,* 347 U.S. 483 (1954).

Capital punishment presents another example of the same proposition – that constitutionality must be determined by current rather than past values. While the Court has not as yet held the penalty unconstitutional in all cases, it has restricted it to a far greater extent than was contemplated when the Eighth Amendment was adopted. Moreover, the Fifth Amendment, by providing that no person shall "be twice put in jeopardy of life or limb" for the same crime, obviously sanctioned putting persons in jeopardy of limb *once* for a particular crime. Yet it is doubtful that any court in the United States would today uphold the constitutionality of a law providing that the hand of a convicted thief shall be cut off as punishment for this crime.

In sum, what we contend is that in applying the Establishment and Free Exercise Clauses to the issue

before the Court in the present case, the realities of today rather than of former years must be the determinant factor. Those realities, we submit, necessitate a conclusion that denial of Medicaid benefits for abortion procedures cannot be reconciled with the mandates of the Establishment and Free Exercise Clauses.

B *Decision of the District Court*

The District Court rejected the contention that the challenged statute violates the Establishment Clause of the First Amendment. It did hold, however, that in addition to the Equal Protection guaranty as implied in the Due Process Clause of the Fifth Amendment, the statute impinged upon the Free Exercise Clause when abortion is resorted to "in conformity to religious belief and teaching." The concluding paragraph of the opinion reads as follows:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

We believe that the District Court was completely correct in recognizing the conscientious nature of the abortion decision and the impermissability of restrictions in light of the deep division on this question in our society. But we believe that the Court erred in failing to recognize the Establishment clause violation and thereby limiting the applicability of the First Amendment to the challenged statute.

II. Religious Tests for Public Benefits

The complaint herein does not assert, nor did the court below pass upon any contention that the ban in Article VI of the Constitution on religious tests for public office requires the Court to invalidate the exclusion of abortion procedures from eligibility for Medicaid benefits. Such contention is not necessary for the determination of the present case. What we do suggest is that in construing and applying the First Amendment's mandates in respect to the establishment and free exercise of religion the Court may justifiably be guided by the spirit that underlies the religious test provision.

In *Common Sense* Tom Paine expressed what fifteen years later was to be the substance of the opening words of the First Amendment, that Congress was to make no law respecting an establishment of religion or prohibiting its free exercise. "As to religion," he wrote, "I hold it to be the indispensible duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." This principle, at least as applied to the national government, had become part of the American credo by the time our constitution was formulated a decade later; so much so that there were many who believed that (with one exception, shortly to be noted) there was really no need for its restatement in the Constitution. "Why," asked Alexander Hamilton,

"declare that things shall not be done which there is no power to do?"[1] The American people, of course, were not satisfied with exclusion by implication. A bill of rights, said Thomas Jefferson, should not "rest upon inferences," a thought echoed by Patrick Henry who asserted that religious freedom and church-state separation should not rest "on the ingenuity of logical deduction."[2] Because the overwhelming concensus of American opinion agreed with Jefferson and Henry, the First Amendment was added to the Constitution in 1791.

Since it was obviously within the powers of the federal government to prescribe the conditions and requisites for governmental service, the ban on religious tests for public office was necessarily included in the text of the Constitution in accordance with the overwhelming approval of the American people. Applying the intent of that ban to abortion procedures, it would clearly be unconstitutional under it to exclude from governmental services physicians who in their private practice render abortion services. That could not be considered anything but the application of religious test for governmental office.

In *Torcaso* v. *Watkins,* 367 U.S. 488 (1961), the Court ruled violative of the First Amendment a Maryland statute requiring notaries public, as condition to receipt of their license, to take an oath that they believed in the existence of God. The complaint therein included a cause of action based upon the Religious Test Clause in Article VI. Since the Court found the statute violative of the First Amendment, it did not find it necessary to determine whether the Article VI prohibition was applicable to the states. *Ibid,* Footnote 1.

---

[1]Federalist Papers, Modern Library Edition, 1937, p. 559.

[2]J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution,* 1888, Vol.. V, p. 131.

It can hardly be doubted that had Torcaso been an applicant for notary public license in the adjoining geographical borders of the District of Columbia the denial would have been held violative of the Religious Test Clause. It is inconceivable that any court would hold that the statute did not require notaries public to believe in the existence of God but only to swear that they do; compulsion to take the oath in order to qualify would of itself violate the prohibition. (Cf *Anderson* v. *Laird,* 466 F.2d 283 [D.C. Cir. 1972], *certiorari denied,* 409 U.S. 1070 [1972], wherein compulsory chapel attendance by military cadets was held unconstitutional notwithstanding claim that they were not required to believe what they heard but only to be present.) Nor, to bring the Torcaso illustration closer to home, would the Court have decided differently if the challenged statute had provided only that a person otherwise entitled to receive governmental reimbursement for a notary public's fee in respect to governmental matters should be turned away because he had not taken the required oath of belief in the existence of God.

The women plaintiffs in this case are not holders of public office and hence the ban in Article VI on religious tests is not applicable to them. Nevertheless, we submit that in adjudging the merits of their claim to the public benefit (rather than public office), of Medicaid reimbursement and of their assertion that exclusion violates the First Amendment; the rationale we have suggested in respect to government employees is relevant and meaningful to a judicial determination of that claim. In short, the spirit if not the letter of Article VI points to the result they seek under the First Amendment, namely that governmental benefits no less than governmental office cannot constitutionally be denied on the basis of what realistically is a religious test.

III. Establishment of Religion

A. *Introductory*

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the Court defined the meaning of the Establishment Clause in the following words:

> The "establishment of religion" clause of the First Amendment means at least this. Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." 330 U.S. at 15.

In more recent decisions the test of constitutionality under the Establishment Clause has been worded somewhat differently. In these cases, the Court has set forth the test in the following language:

> . . . In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion. *Wolman* v. *Walter, supra,* at p. 2596.

The two tests are not inconsistent but rather supplement each other. Indeed, in *Abington Township School District* v. *Schempp,* 374 U.S. 203 (1963), in which the Court first set forth the purpose-effect (later, purpose-effect-entanglement) test, it also relied upon the *Everson* no-aid test, using both to reach the same conclusion of the unconstitutionality of Bible reading and prayer recitation in the public schools. Five years later, in *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), the Court again used both tests to invalidate a statute forbidding the teaching of evolution in public schools. In subsequent cases, the Court has frequently cited and quoted from *Everson* at the same time as it has applied the purpose-effect-entanglement test. See, e.g., *Wolman* v. *Walter, supra,* at 2596.

We submit that whether measured by the *Everson* or the purpose-effect-entanglement test, the statutory bar challenged herein cannot stand.

B. *The Everson Test*

Exclusion of abortion procedures from Medicaid coverage violates the mandate of the *Everson* decision against passing laws which "aid one religion, aid all religions, or prefer one religion over another." This Court can take judicial notice of the fact, obvious to any who read newspapers or periodicals dealing with the news, that for all practical purposes it is the normative interpretation of the dogma and doctrine of some religious groups, which is aided by the exclusion. Irrespective of this, the fact that the submitters of this brief are religious groups

representing millions of Americans is itself further and conclusive proof that the exclusionary statute prefers some religions over others. Having said that, we note that even if we were in error, and even if all the faiths in the nation shared the position of these churches in respect to abortion procedures, the *Everson* ban would still be applicable since it forbids aid to *all* religions, even if the aid be non-preferential.

We do not deem it necessary to establish that denial of Social Security benefits to Americans who resort to abortion constitutes aid to those religions which forbid abortions. Were the mandates of the churches honored by the congregants, there would be no need to exclude abortion from Medicaid coverage. In resorting to Congress and state legislatures, the churches are calling upon governments to do by compulsion that which they have themselves been unable to achieve by persuasion. If separation of church and state means anything, it means that government may not respond affirmatively to such a demand.

The quoted paragraph from *Everson* also forbids, as a violation of the Establishment Clause, participation by a state or the federal government, "in the affairs of any religious organization and vice versa." The role taken by churches in seeking to impose legislative barriers to legal access to abortion generally and to Medicaid abortion benefits in particular is a clear illustration of the "vice versa" prohibition in the *Everson* test, that is, participation by religion in governmental affairs. The law, in effect imposes on the governmental function of distributing social security benefits the religious doctrine against abortion. The Hyde Amendment effectively adds a religious censor to the administration of the welfare program.

Finally, we note in respect to the *Everson* principle, that the Court in that case interpreted the Establishment

Clause as requiring the state to be "neutral in its relations with groups of religious believers and non-believers." Exclusion of Medicaid benefits for abortion procedures, an exclusion urged for practically no reason other than their religion-based unacceptability, is manifestly not consistent with neutrality, either among the religions or between religious believers and non-believers.

C. *The Purpose-Effect-Entanglement Test*

1. Purpose

We note initially that we do not, nor can we rightfully contend that churches violate the Constitution in seeking enactment of legislation that translates into the law of the land their own particular doctrine and dogma. Next to freedom to believe, there is no constitutional right protected by the First and Fourteenth Amendments that is as close to absolute as the right to petition the government for a redress of grievances. That right encompasses petitions upon legislatures, state or federal, and upon their members to enact measures which others may consider to be unconstitutional. What we urge is only that in ascertaining whether the purpose of challenged legislation is to aid or advance religion the courts may and should consider as an evidentiary factor the role played by churches in obtaining its enactment.

In *McGowan* v. *Maryland, supra,* the Court judicially noted that Sunday laws originated as religious laws and that their historic purpose was to forbid desecration of the Christian Sabbath and to coerce compliance with Christian doctrine. It nevertheless upheld the constitutionality of the state law there assailed because it found as a historical fact that in the course of time the religiousity of the law had disappeared and its present purpose and effect

had become the secular one of assuring to all a day of rest and relaxation. However, in the closing paragraph of the Chief Justice's opinion for the Court, he was careful to note (366 U.S. at 453):

> Finally, we should make it clear that this case deals only with the constitutionality of §521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.

Several years later, in *Epperson* v. *Arkansas, supra,* the Court found that the religious purpose of the challenged statute, which forbade the teaching of evolution in the public schools, had been adequately demonstrated.

> . . . It is clear [the Court said] that the fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose was to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man. (393 U.S. at 108-109).

Compulsion by withholding sorely needed funds, we respectfully suggest, is not constitutionally distinguishable from the less subtle form of duress in dismissal from employment.

Among the millions of persons who are affiliated with the religious organizations joining in this brief amici curiae there are undoubtedly many persons who adhere to a literal interpretation of the Bible and reject an evolutionary explanation of the origin of human beings. Some of them do, and are constitutionally entitled to demand that their own children be excused from attending class when the evolutionary explanation is presented. Some, finding this inadequate, support and send their children to those nonpublic schools which adhere to their own religious commitments in respect to the teaching of the origin of the human race. But all recognize that under the First Amendment they cannot rightfully demand that the public schools not teach the theory of evolution even though they themselves are compelled by law to pay taxes which are used in part to finance the operations of those schools. Indeed, the effort to restrict the teaching of evolution in *Epperson* (393 U.S., at 98 note 3, 108 note 16) was exclusively predicated on use of tax funds for that purpose.

Applying the *Epperson* decision to the case before this Court, it is obvious that the government, state or federal, could not constitutionally compel a woman either to foreforego or to undergo an abortion. Nor could it, by the same reasoning, withhold payment for attendant medical services to economically disadvantaged women who choose to resort to abortion while at the same time making such payments to women who do not elect that procedure or *vice versa*. In either case, it would be an unconstitutional law respecting an establishment of religion since it would lack a valid secular legislative purpose. A law ex-

cluding payment for abortion services from the Medicaid program can be no more justifiable under the secular-purpose aspect of the establishment test than a law barring payment from tax-raised funds of the salaries of biology teachers in public schools who include the theory of evolution in their course. The underlying purpose of the laws in both cases would be to inhibit to what the great majority of Americans is a valid, secular undertaking, and both should be declared equally unconstitutional.

2. Primary Effect

The primary effect, or at least *a* primary effect of the statute challenged herein, is to advance religions which forbid abortion and inhibit those which permit it or indeed may affirmatively counsel it in order to mitigate against the tragedies of unplanned pregnancies. This conclusion is inescapable when one views the historical background of anti-abortion laws. That background is set forth in *Roe* v. *Wade,* 410 U.S. 113, at 130-141 (1973), and will not be repeated here. The religious origin and purpose of these laws has been widely recognized by scholars and jurists alike.[3] Justice Douglas noted this in his dissenting opinion in *United States* v. *Vuitch,* 402 U.S. 62, 78-79 (1971):

> Abortion statutes [he said] deal with conduct which is heavily weighted with religious teachings and ethical concepts. Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." . . . The difficulty and

[3]See D. Callahan, Abortion: Law, Choice and Morality, Ch. 1[2] (1970); J. Noonan, Contraception (1965); Noonan, "Abortion and the Catholic Church: A Summary History," 12 National Law Forum, 85-131 (1967); R.J. Huser, The Crime of Abortion in Canon Law (1942). See also Tietze and Lewitt, "Abortion," 220 Scientific American 21 (January 1969) where opposition to abortion is traced to the rise of the Jewish and Christian religions.

> danger are compounded when religion adds another layer of prejudice. The end result is that juries condemn what they personally disapprove. (Citations omitted.)

Substituting the word "legislatures" for "juries" in the last sentence makes the quotation particularly apposite here.

Justice Douglas quoted the following from an article by former Justice Clark (at 79, n. 2):

> Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," i.e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i.e., able to support itself outside the women. In balancing the evils, the latter concluded that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth. Religion , Morality, and Abortion; A Constitutional Appraisal, 2 Loyola U.S. Rev. (L.A.) 1, 4 (1969).

It is true that the arguments presented by advocates of return to anti-abortion laws are often presented in terms of morality rather than religion or theology; it could hardly be otherwise in a nation with a strong commitment to the separation of church and state. But, as the Court said in *Bigelow* v. *Virginia,* "a State cannot foreclose the exercise of constitutional rights by mere labels." 421 U.S. 809 at 826 (1975). The association of religion and morals is widely accepted, particularly among those with religious commitments. The "morality plays of Elizabethan England were religious plays. Jefferson called God "the author of all the relations of morality."[4] Clergymen and educators today commonly speak of "moral and spiritual values." The Catholic Church affirms its infallibility in teaching doctrines of "moral and spiritual values," and affirms the need to honor these values in order to be saved.[5] It is no mere concidence that positions on the morality or immorality of abortion vary among religious groups in conformity to their religious commitments. Churches whose doctrine or discipline forbids abortion hold it to be immoral; those whose doctrine or discipline permit abortion do not deem it to be immoral. It would be somewhat difficult for a legislature to charge, or a judge to determine that the religious organizations which are submitting this brief and their many millions of adherents are guilty of seeking to defend immorality.

In the present case, legislatures have sought to impose upon entire communities the religious doctrine of those to whom abortions are sinful. This unconstitutional imposition cannot be justified on the claim that abortion is immoral any more than a law banning the use of contraceptives can be so justified. *Griswold* v. *Connecticut,* 381

---

[4]1 A.P. Stokes, Church and State in the United States 337 (1950).

[5]Baltimore Catechism, 1949 Edition, p. 127.

U.S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). In either case the claim of immorality is no more than an effort to compel the entire community to conform to the religious doctrines of particular groups. That is particularly true where, as in both cases, the majority of Americans do not consider the practice to be immoral.

The conclusion is inescapable that a primary effect of the exclusion of abortion procedures from Medicaid coverage is to advance the religious doctrine of those who hold abortions to violate God's law. It imposes upon those who do not share this view the theology of those who do. At its least, the establishment of religion bans imposing on all of the community the theology of some. It is immaterial whether the theology is that of a majority of the community. Nor is it material whether it is frankly designated as theology or euphemistically labelled morality. As Justice Clark said in the article from which we have already quoted:

> Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions." (O.W. Holmes, The Common Law)[6]

3. Entanglement With Religion

Much need not be said in respect to government entanglement in religious controversy and political divisions along religious lines, the avoidance of which was one of

[6]2 Loyola L. Rev. (L.A.) at page 6. It is significiant that Justice Clark was the author of the opinion in *Abington School District* v. *Schempp,* supra, in which the purpose-effect test was formulated. It is obvious that the author of this establishment test did not consider anti-abortion laws and regulations consistent with it.

the major purposes of the Establishment Clause. No one exposed to newspapers, periodicals and other media of public communication can be unaware of the religious acrimony and religio-political divisiveness brought on by the abortion controversy. Framing the controversy in terms of morals aggravates rather than ameliorates the conflict, for it implies that those religious groups who oppose covercive anti-abortion governmental action support or at least condone immorality.

The Court, in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), has pointed out the harm to our political system resulting from governmental entanglement with religion. It said (at p. 622):

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not

> likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

The Court's warning has stark relevancy to the situation in the present case. Few issues have rent the American people and their government so sharply along religious lines as those involved in the abortion controversy, particularly in respect to availability of abortion to the economically disadvantaged.

To sanction partisan involvement by government in such controversies would be to frustrate a major purpose of the Establishment Clause. "Torrents of blood," Madison warned in his Memorial and Remonstrance Against Religious Assessments, "have been spilt in the old world, by vain attempts of the secular arm, to extinguish religious discord by proscribing all difference in religious opinions."[7]

Interreligious tranquility cannot be achieved by governmental entanglement in religious controversy, and especially not by imposing upon all the religious commitments of some. We should not return to the Peace of Augsburg and its Erastian principle, *cujus regio, e jus religio,* whereunder the religion of a province is determined by the religion of its prince or parliament. M.E. Marty, *A Short History of Christianity,* (1959) 245.

[7]Madison's Memorial is set forth in full as an Appendix to Justice Rutledge's dissenting opinion in *Everson,* 330 U.S. 63, 69.

IV. Free Exercise of Religion

There are instances where the dual First Amendment guarantees of church-state separation and freedom of religious exercise are or appear to be in conflict with each other, calling upon or apparently calling upon the courts to make a choice between them. See, e.g., *Walz* v. *Tax Commission,* 397 U.S. 664 (1970) (tax exemption for churches); *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) (compulsory attendance at secondary schools); *TransWorld Air Lines* v. *Hardison,* 432 U.S. 63 (1977) ("Religious Accommodation" amendment to 1964 Civil Rights Act). Whether or not these cases present real conflict is by no means certain but, in any event, if they do, they constitute the exception rather than the rule. In the overwhelming majority of cases, the dual guarantees of the Amendment support rather than conflict with each other. See, e.g., *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952); *Torcaso* v. *Watkins, supra.*

The last cited case is particularly apposite. There, as previously noted herein, the Court held violative of both guarantees in the Religion Clause of the First Amendment a state statute barring from public office any person who refused to take an oath that he believed in the existence of God. The Court reached this conclusion notwithstanding the fact that the plaintiff was an avowed atheist and therefore had no religion, at least as that term is generally understood. Just as freedom of speech guarantees equally freedom of nonspeech (*West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943), so, the Court held, does freedom of religion guarantee freedom of nonreligion or, as often stated, freedom from religion.

It cannot be argued that use of tax-raised funds to finance abortion procedures for the economically under-

privileged violates the Free Exercise rights of those whose religious convictions forbid the procedures. The Court has consistently rejected contentions that use of tax-raised funds to finance flouridated water even where there is no other drinking water available in the community violates the Free Exercise Clause as it applies to persons whose religious conscience forbids drinking fluoridated water. See, *e.g., Birnel* v. *Town of Firecrest,* 361 U.S. 10 (1959), dismissing for want of a substantial federal question, 53 Wash. 2d 830. Similarly, use of tax-raised funds to finance municipal hospitals which employ blood transfusion procedures does not impair the Free Exercise rights of those who deem such procedures as violating God's prohibition of drinking blood. *Cf. Application of Georgetown College,* 331 F.2d 1000, certiorari denied, 377 U.S. 585 (1964).

In these cases, and others that can be cited (e.g., religious convictions against all medical procedures in municipal hospitals, exclusion of Bible-reading or prayer from public school programs) the Court has held that the religious freedom of conscientious objectors to the practices or exclusions is not violated even though their taxes are used in part to finance them. Underlying all these decisions is the basic conclusion that it is the province of the courts, and ultimately the Supreme Court, to adjudge what is secular and what is sectarian, and in respect to the issue in the present case this Court has ruled that access to abortion procedures as to fluoridated water or medical treatment is a secular right not subject to restriction on religious grounds.

What we suggest is that the statutory exclusion of abortion procedures from Medicaid coverage violates the Free Exercise rights of those individuals whose religion counsels that abortion may be justified to protect the health and welfare of the woman and her family. We believe that this conclusion is supported by the Court's interpretation of the Clause in many cases, but with most relevancy to the instant case, in *United States* v. *Steeger,* 380 U.S. 163 (1965).

That case challenged the constitutionality under the Establishment and Free Exercise Clauses of the provision in the Universal Military and Training and Service Act, 50 U.S.C. App. 456 (j), which provided exemption from military training of persons "who, by reasons of religious training and belief [are] conscientously opposed to participation in war in any form." The statute defined religious training and belief to mean "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

The Court avoided the necessity of passing upon the constitutionality of the challenged statute by construing belief "in a relation to a Supreme Being" to encompass any "belief that is sincere and meaningful [and] occupies a placed in the life of the possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Thus, in respect to one of the objectants in the case before it, the Court held that the statutory exemption included one who asserted that while he did not believe in a God in the traditional sense, that is "vertically, towards Godness directly," he did believe in "Godness horizontally," that is "through Mankind and the World."

It is difficult to read this interpretation into the textual language of the challenged statute. It is quite obvious, however that the Court employed the device of statutory construction to avoid passing not merely upon the constitutionality of the statute but also declaring it unconstitu-

tional. In the present case the constitutional question cannot easily be avoided through construction. One would not find it easy to interpret the relevant Medicaid provision as exempting from exclusion either women whose conscientious belief as defined in *Seeger* mandates access to abortion procedures or physicians providing the service who share in that belief. It follows, therefore, on the basis of *Seeger,* that if one can have a conscientious belief entitled to constitutional protection against participation in war, one should be entitled to the same constitutional protection if she believes that abortion is in harmony with or is mandated by her religious convictions.

As we have noted, the organizations who join in this brief include among their membership persons whose religious conscience impels access to abortion even when not required to preserve the life of the woman. To deny access on the part of economically disadvantaged women solely or principally because the procedure is contrary to the religious doctrines of some churches is, we submit, to deny her and her physicians the constitutional right to the free exercise of religion.

CONCLUSION

For the reasons stated we believe that judgment appealed from should be affirmed.

Respectfully submitted,

LEO PFEFFER
Attorney for *Amici Curiae*
191 Willoughby Street
Brooklyn, N.Y. 11201
Tel.: (212) 855-1701

A Call to Concern

The increasing urgency of the issue of abortion rights requires us as teachers and writers of religious ethics to speak out.

Abortion is a serious and sometimes tragic procedure for dealing with fetal life. It raises important ethical issues and cannot be blandly legitimized by the mere whim of an individual. Nevertheless, it belongs in that large realm of often tragic actions where circumstances can render it a less destructive procedure than the rigid prolongation of pregnancy.

We support the Supreme Court decisions of 1973 which had the effect of removing abortion from the criminal law codes. The Court did not appeal to religion or ethics in arriving at its judgment, but we believe the decision to have been in accord with sound ethical judgment. Taking note of the fact that theologians, as well as other experts, disagree on the fundamental moral question of when life begins, the Court decided that the law ought not to compel the conscience of those who believe abortion to be in harmony with their moral convictions.

In the last four years, however, those decisions have been subjected to a relentless attack from those who take the absolutist position that it is always wrong to terminate a pregnancy at any time after the moment of conception. Those who take this absolutist position have not hesitated to equate abortion at any stage of pregnancy with murder or manslaughter. From such an extreme viewpoint, all legal means are considered justified if they limit abortions, no matter what the human consequences for poor women

and others—as in the recent efforts to deny Medicaid funds and to prohibit use of public hospitals for abortion services.

We feel compelled to affirm an alternative position as a matter of conscience and professional responsibility.

1. The most compelling argument against the inflexibility of the absolutist position is its cost in human misery. The absolutist position does not concern itself about the quality of the entire life cycle, the health and well-being of the mother and family, the question of emotional and economic resources, the cases of extreme deformity. Its total preoccupation with the status of the unborn renders it blind to the well-being and freedom of choice of persons in community.

2. "Pro-life" must not be limited to concern for the unborn; it must also include a concern for the quality of life as a whole. The affirmation of life in Judeo-Christian ethics requires a commitment to make life healthy and whole from beginning to end. Considering the best medical advice, the best moral insight, and a concern for the total quality of the whole life cycle for the born and the unborn, we believe that abortion may in some instances be the most loving act possible.

3. We believe it is wrong to deny Medicaid assistance to poor women seeking abortions. This denial makes it difficult for those who need it most to exercise a legal right, and it implies public censure of a form of medical service which in fact has the moral support of major religious groups.

4. We are saddened by the heavy institutional involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into law, and we view this as a serious threat to religious liberty and freedom of conscience. We acknowledge the legal right of all individuals and groups, both religious and secular, to seek laws that reflect their religious and ethical beliefs. But the institutional mobilization of Roman Catholic dioceses, including massive financial contributions by those dioceses to the National Committee for a Human Life Amendment, is inappropriate on this issue. If successful, it would violate the deeply held religious convictions of individual members and official bodies of many other religious groups about when human personhood begins, the relative rights of a woman and a fetus, and responsible family life. This is particularly a problem when there is no clear majority opinion on these fundamental issues nor an adequate social base of consensus for legitimate and enforceable legislation.

5. We call upon the leaders of religious groups supporting abortion rights to speak out more clearly and publicly in response to the dangerously increasing influence of the absolutist position. There may be some ecumenical risks in such candor, but those risks have already been assumed by those who have pressed the absolutist position on religious grounds. In the long run, the true test of ecumenical authenticity is the ability to sustain dialogue and friendship in spite of very sharp disagreements on matters of substance.

Bob E. Adams
Assoc. Prof. of Christian Social Ethics
Southwestern Baptist Theological Seminary
James Luther Adams
Prof. Emeritus, Christian Ethics
Harvard Divinity School
James E. Allen
Assoc. Prof., School of Public Health
University of North Carolina
Joseph L. Allen
Prof. of Christian Ethics, Perkins School of Theology
Southern Methodist University
Alan B. Anderson
Prof. of Interdisciplinary Studies
Wilberforce University
Khoren Arisian
Pres., National Leader's Council
American Ethical Union
Grover C. Bagby
Assoc. Gen. Sec., Board of Church and Society
The United Methodist Church
Robert C. Batchelder
Lecturer, Trinity College
Waldo Beach
Pres., American Society of Christian Ethics
Prof. of Christian Ethics
Duke University Divinity School
Rabbi Jack Bemporad
Adj. Prof. of Philosophy
Southern Methodist University
John C. Bennett
Past Pres., Amer. Society of Christian Ethics
President Emeritus
Union Theological Seminary (NYC)
Walter F. Bense
Assoc. Prof. of Religion
University of Wisconsin
Elizabeth Bettenhausen
Secretary for Social Concerns
Lutheran Church in America
Thomas A. Bland
Prof., Southeastern Baptist Theological Seminary

Robert W. Blaney
Prof. of Religious Studies
University of the Pacific
Sheldon H. Blank
Professor, Hebrew Union College
Joseph L. Blau
Prof. Emeritus of Religion
Columbia University
Richard Bond
Ramapo College of New Jersey
Jack S. Boozer
Prof. of Religion, Emory University
Eugene B. Borowitz
Prof. of Jewish Religious Thought
Hebrew Union College–Jewish Institute of Religion
Bruce Boston
Clifton, Virginia
Balfour Brickner
Dir. of Interreligious Activities
Union of American Hebrew Congregations
Howard H. Bright, Jr.
Chairman, Social Science Division
West Virginia Wesleyan College
Charles S. Brown
Prof. of Church and Society
United Theological Seminary (Dayton)
Glenn R. Bucher
Assoc. Prof. of Religion
The College of Wooster
Carole F. Chase
Assoc. Prof. of Religion, Elon College
Henry B. Clark, II
Prof. of Social Ethics
University of Southern California
W. Royce Clark
Prof. of Religion, Pepperdine University
Don F. Colenback
Assoc. Prof. of Christian Ethics
Episcopal Divinity School
James H. Cone
Charles A. Briggs Prof. of Theology
Union Thelogical Seminary (NYC)

Wilmer A. Cooper
Dean and Prof. of Theology and Ethics
Earlham School of Religion
Warren R. Copeland
Asst. Prof. of Religion, Wittenberg University
John P. Crossley, Jr.
Assoc. Prof. of Religion
University of Southern California
Dwight W. Culver
Prof. of Sociology
The College of St. Catherine
Paul Deats
Prof. of Social Ethics
Boston University School of Theology
Richard L. Deats
Dir. of Interfaith Activities
Fellowship of Reconciliation
Alvin L. Denman
Assoc. Prof. of Philosophy of Law and Religion
Antioch College
L. Harold DeWolf
Dean Emeritus, Wesley Theological Seminary
John F. Dietz
Wilson, North Carolina
Herbert O. Edwards
Assoc. Prof., Duke University Divinity School
J. Ronald Engel
Assoc. Prof. of Social Ethics
Meadville/Lombard Theological School
Marvin D. Erisman
Coordinator, Crisis Services
Los Angeles Baptist City Society
Norman J. Faramelli
Boston Industrial Mission
John C. Fletcher
Spec. Assist. for Bioethics
Clinical Center, National Institute of Health
Newton B. Fowler, Jr.
Prof. of Social Ethics
Lexington Theological Seminary
George L. Frear
Assoc. Prof. of Religious Studies
St. Lawrence University

E. Clinton Gardner
Past Pres., Amer. Society of Christian Ethics
Prof. of Christian Ethics
Emory University
John M. Gessell
Prof. of Christian Ethics, School of Theology
University of the South
Alan Geyer
Dir., Churches' Center for Theology and Public Policy
Ray Gibbons
Dir. Emeritus
Council for Christian Social Action, U.C.C.
Boyd Gibson
Asst. Prof. of Religion
Susquehanna University
William E. Gibson
Coordinator, Eco-Justice Project
Center for Religion, Ethics and Social Policy
J. Herbert Gilmore, Jr.
Gatlinburg, Tennessee
Rabbi Ronald B. Gittelsohn
Boston, Massachusetts
David M. Graybeal
Prof. of Christian Ethics, Drew University
Ronald M. Green
Asst. Prof., Dartmouth College
William A. Greenlaw
New York
M. Michael Grupp
Leader, Society for Ethical Culture
American Ethical Union
Elly H. Haney
Assoc. Prof. of Religion, Concordia College
Beverly Wildung Harrison
Prof. of Christian Ethics
Union Theological Seminary (NYC)
Paul M. Harrison
Prof. of Religious Ethics
Penn State University
Hideo Hashimoto
Prof. Emeritus, Lewis and Clark College

Roger D. Hatch
Asst. Prof. of Religion
Central Michigan University
H. Katherine Havice
Arnold W. Hearn
Mountain View, Arkansas
Karl H. Hertz
Prof. of Church History and Ethics
Hamma School of Theology
Carter Heyward
Asst. Prof. of Theology
Episcopal Divinity School (Cambridge)
Richard A. Hoehn
Brite Divinity School
Texas Christian University
Lawrence Hoffman
Prof. of Liturgy, Hebrew Union College–Jewish Institute of Religion
Clyde A. Holbrook
Prof. Emeritus, Oberlin College
Douglas G. Hook
Clint Hopkins
Sec., Dept. of Social Ministries
Virginia Baptist General Board
Joseph Hough
Dean, School of Theology at Claremont
John W. Hunter
Dean, Sandy Springs Friends School
Sandy Springs, Maryland
William H. Jennings
Assoc. Prof. of Religion, Muhlenberg College
Roger A. Johnson
Chairman, Religion Department
Wellesly College
Major J. Jones
President, Gammon Theological Seminary
Mark Juergensmeyer
Assoc. Prof. of Ethics and Comparative Religion
University of California (Berkeley)
Loyle Shannon Jung
Asst. Prof. of Sociology and Religion
Virginia Intermont College

Charles L. Krammer, III
Instructor of Christian Ethics
St. Olaf College
George D. Kelsey
Prof. Emeritus, Drew University
Patricia A. Kendall
Chairperson, Pennsylvania Commission of United Ministries in Higher Education
Huber F. Klemme
Mayville, North Dakota
Hugh A. Koops
Prof. of Church and Community
New Brunswick Theological Seminary
Leonard Kravitz
Prof., Hebrew Union College – Jewish Institute of Religion
Clark A. Kucheman
Prof. of Christian Ethics, Claremont Men's College and Claremont Graduate School
Joseph A. LaBarge
Dept. of Religion, Bucknell University
Karen A. Lebacqz
Assoc. Prof. of Christian Ethics
Pacific School of Religion
William H. Lazareth
Dir., Dept. for Church and Society
Lutheran Church in America
Paul Lehmann
Charles A. Briggs Prof. of Systematic Theology, Emeritus
Union Theological Seminary (NYC)
Murray H. Leiffer
Past Pres., Amer. Society of Christian Ethics
Prof. Emeritus
Garrett-Evangelical Theological Seminary
Dr. J. Patrick Logan
Edward LeRoy Long, Jr.
Past Pres., Amer. Society of Christian Ethics
Prof. of Christian Ethics
Drew University
Howard L. Lunger
Prof. Emeritus of Christian Ethics
Brite Divinity School, Texas Christian University

Charles P. Lutz
Church in Community
The American Lutheran Church
Marjorie Reiley Maguire
Milwaukee, Wisconsin
R. Kenneth Manning, Jr.
Prof. of Law, Cumberland School of Law
Richard M. Martin
Asst. Prof. of Humanities and Neurology
Medical College of Georgia
Margaret N. Maxey
Prof. of Bioethics, University of Detroit
Hayden McCallum
Prof. of Christian Ethics
Episcopal Divinity School
Dennis McCann
Asst. Prof. of Religion, Reed College
Robert McFadden
Prof. of Religion, Bridgewater College
Thomas R. McFaul
Assoc. Prof., Human Sciences and Humanities
University of Houston
Daniel B. McGee
Prof. of Christian Ethics, Baylor University
Russell L. McIntyre
Dir., Programs in Health Care Humanities
College of Medicine and Dentistry of New Jersey
Stuart D. McLean
Assoc. Prof. of Christian Education
Graduate Seminary, Phillips University
M. Douglas Meeks
Assoc. Prof. of Systematic Theology and Ethics
Eden Theological Seminary
John Giles Milhaven
Prof. of Religious Studies, Brown University
Donald E. Miller
Asst. Prof. of Social Ethics
University of Southern California
Donald E. Miller
Prof. of Christian Education and Ethics
Bethany Theological Seminary
Oakbrook, Illinois

Haskell M. Miller
Prof. Emeritus of Social Ethics
Wesley Theological Seminary
Howard M. Mills
Sec., Division of Ministry
United Church of Canada
Robert C. L. Moffat
Prof. of Law, University of Florida
Roy D. Morrison II
Prof. of Black Philosophy of Culture and Religion
Wesley Theological Seminary
Stephen Charles Mott
Assoc. Prof. of Christianity and Society
Gordon-Conwell Theological Seminary
Phillips P. Moulton
Visiting Scholar, University of Michigan
Eric Mount, Jr.
Prof. of Religion, Centre College
Walter G. Muelder
Pres.-Des., Amer. Society of Christian Ethics
Dean Emeritus
Boston University School of Theology
Ludwig Nadelmann
Jewish Reconstructionist Foundation
James A. Nash
Exec. Dir., Massachusetts Council of Churches
F. Burton Nelson
Prof. of Theology and Ethics
North Park Theological Seminary
Gordon L. Nelson
Assoc. Prof. of Sociology and Religion
Augsburg College
Randy A. Nelson
Assoc. Dir. of Contextual Education
Luther-Northwestern Seminaries
N. Leroy Norquist
Assoc. Prof. of New Testament
Lutheran School of Theology at Chicago
Russell Bradner Norris
Mount Union, Pennsylvania
Victor Obenhaus
Past. Pres., Amer. Society of Christian Ethics
Prof. of Christian Ethics, retired
Chicago Theological Seminary

Thomas W. Ogletree
Prof. of Theological Ethics
Divinity School, Vanderbilt University
Levi A. Olan
Former Pres., Central Conference of Amer. Rabbis
Rabbi Emeritus, Temple Emanuel, Dallas, Texas
Richard P. Olson
Racine, Wisconsin
David B. Parke
Brewster, Massachusetts
David Parks
Asst. Prof. of Religion
Oklahoma City University
Robert Rue Parsonage
National Council of Churches
Jane Cary Peck
Asst. Prof. of Religion and Society
Andover-Newton Theological Seminary
Leo Pfeffer
American Jewish Congress
Robert G. Pielke
Asst. Prof., George Mason University
Edwin L. Plowman
Asst. Prof. Sociology Department
High Point College
William Puffenberger
Prof. of Religion and Philosophy
Elizabethtown College
Terry A. Purvis-Smith
Cortland, New York
John C. Raines
Assoc. Prof. of Religion, Temple University
William W. Rankin
Durham, N.C. County Dept. of Social Services
Guy H. Ranson
Prof. of Religious Ethics, Trinity University
Larry L. Rasmussen
Prof. of Christian Social Ethics
Wesley Theological Seminary
Janice G. Raymond
Asst. Prof. of Women's Studies/Medical Ethics
Five-College Faculty, Amherst

Robert D. Reece
Religion Dept. and School of Medicine
Wright State University
Darrell Reeck
Chairman, Dept. of Religion
University of Puget Sound
George C. Reese
Prof. of Religion, Thiel College
Rosemary R. Reuther
Georgia Harkness Prof.
Garrett-Evangelical Theological Seminary
Charles H. Reynolds
Dept. of Religious Studies
University of Tennessee
James Reynolds
Dallas, Texas
Dan D. Rhoades
School of Theology at Claremont
Lynn N. Rhodes
Boston University School of Theology
Francis E. Ringer
Lancaster Theological Seminary
Michael Germinal Rivas
J. DeOtis Roberts, Sr.
School of Religion, Howard University
Keith A. Roberts
Asst. Prof. of Natural and Social Sciences
Bowling Green State University
D. B. Robertson
Prof. of Religion, Syracuse University
Isabel Rogers
Prof., Presbyterian School of Christian Education
Letty M. Russell
Assoc. Prof. of Theology
Yale University Divinity School
Charles J. Sabatino
Prof. of Religious Studies, Daemen College
Richard E. Sanner
Chaplain and Instructor in Religion
Wheaton College (Massachusetts)
John H. Satterwhite
Past Pres., Amer. Society of Christian Ethics
Exec. Sec., Center for Black Union, Washington, D.C.

Harold M. Schulweis
Adj. Prof. of Jewish Theology, University of Judaism
Lecturer, Hebrew Union College, Los Angeles
Steven S. Schwarzchild
Prof. of Philosophy and Judaic Studies
Washington University
Lee Osborne Scott
Prof. of Religion, Denison University
Timothy F. Sedgwick
Prof. of Philosophy and Religion
Blackburn College
Harvey Seifert
Emeritus Prof. of Christian Ethics
School of Theology at Claremont
Robert Paul Sessions
Chatanooga, Tennesee
Talbert O. Shaw
Prof. of Ethics and Society
Howard University School of Religion
Earl E. Shelp
Fellow, Theology and Medical Ethics
Texas Medical Center Institute of Religion
Robert L. Shelton
Assoc. Prof. of Religious Studies
University of Kansas
Franklin Sherman
Prof. of Christian Ethics
Lutheran School of Theology at Chicago
Roger L. Shinn
Past Pres., Amer. Society of Christian Ethics
Prof. of Social Ethics, Union Theological Seminary
Morton Siegel
Director of Education
United Synagogue of America
Donald W. Shriver, Jr.
President, Union Theological Seminary (NYC)
Paul D. Simmons
Assoc. Prof. of Christian Ethics
Southern Baptist Theological Seminary
Ervin Smith
Assoc. Prof. of Christian Ethics
Methodist Theological School of Ohio

Kenneth L. Smith
Prof. of Applied Theology
Colgate Rochester/Bexley Hall/Crozer Seminary
James F. Smurl
Assoc. Prof. of Religious Ethics, Indiana University
David J. Snider
Consultant on Social Justice Issues
Detroit, Michigan
T. Richard Snyder
Dir., Inter Seminary Theological Education
for Ministry
Howard F. Sohn
Asst. Prof. of Religion and Ethics
Mount Holyoke College
A. McLean Spauding
Hood Theological Seminary
Charles M. Spring
West Virginia University
Glen H. Stassen
Assoc. Prof. of Christian Ethics
Southern Baptist Theological Seminary
Dave Steffenson
University of Wisconsin (Green Bay)
Robert L. Stivers
Assoc. Prof. of Religion
Pacific Lutheran University
Ronald H. Stone
Prof. of Social Ethics
Pittsburgh Theological Seminary
Jack L. Stotts
Prof. of Christian Ethics
McCormick Theological Seminary
Carl Benton Straub
Assoc. Prof. of Religion, Bates College
Maynard H. Strothmann
Carterville, Illinois
Douglas Sturm
Prof. of Christian Ethics, Bucknell University
Stanley L. Sutphin
Prof. of Religion and Philosophy
Elizabethtown College

John M. Swomley, Jr.
Prof. of Christian Ethics
St. Paul School of Theology
Charles Teel, Jr.
Asst. Prof. of Religion and Society
Loma Linda University
Richard Tholin
Prof. of Christian Ethics
Garrett-Evangelical Theological Seminary
Max D. Ticktin
National Staff
B'nai B'rith Hillel Foundation
Foy Valentine
Exec. Sec., The Christian Life Commission
of the Southern Baptist Convention
William Vander Marck
Prof. of Religious Studies, DePaul University
Elizabeth Lam Vieg
Retired Administrator, International
Education Exchange
Philip W. Van Vlack
Board Chairman, The Educational Center
of Hartford
Kenneth Watson
Hollywood, California
John R. Warner, Jr.
Assoc. Prof. of Sociology
West Virginia Wesleyan College
Robert F. Weir
Dept. of Religious Studies
Oklahoma State University
Joseph C. Weber, Jr.
Prof. of Biblical Theology and Ecumenics
Wesley Theological Seminary
Edwin H. Welch
Chairman, Sociology Department
Lebanon Valley College
Charles C. West
Past Pres., Amer. Society of Christian Ethics
Stephen Colwell Prof. of Christian Ethics
Princeton Theological Seminary
L. Elbert Wethington
Prof. of Religion, Lebanon Valley College

Stephen W. White
Philosophy Department
East Tennessee State University
Walter E. Wiest
Prof. of Theology and Ethics
Pittsburgh Theological Seminary
Dana W. Wilbanks
Assoc. Prof. of Christian Ethics
Iliff School of Theology
Herman Will
Assoc. Gen. Sec., Board of Church and Society
The United Methodist Church
James E. Will
Prof. of Systematic Theology
Garrett-Evangelical Theological Seminary
Wallace A. C. Williams
Wilton, Connecticut
Robert E. Willis
Prof. of Religion, Hamline University
Gayraud S. Wilmore
Martin Luther King, Jr., Prof. of Black Church
Studies, Colgate Rochester/Bexley Hall/Crozer
Theological Seminary
Gibson Winter
Prof. of Religion and Society
Princeton Theological Seminary
J. Philip Wogaman
Past Pres., Amer. Society of Christian Ethics
Dean and Professor of Christian Society Ethics
Wesley Theological Seminary
Wilson Yates
Prof. of Church and Society
United Theological Seminary of the Twin Cities
L. William Yolton
Coordinator for Field Education
Harvard Divinity School
George D. Younger
New Jersey

Institutional affiliation for purposes of identification only.

"A Call to Concern" was drafted by the following ad hoc committee of religious ethicists:

James Luther Adams
John C. Bennett
Eugene B. Borowitz
L. Harold DeWolf
Beverly Wildung Harrison
Edward LeRoy Long, Jr.
Jane Cary Peck
James DeOtis Roberts
Douglas Sturm
Richard Tholin
J. Philip Wogaman

and has been reprinted with the permission of the committee by the Religious Coalition for Abortion Rights.

The Religious Coalition for Abortion Rights is comprised of 27 major Protestant, Jewish, Catholic and other religious organizations committed to safeguarding the option of legal abortion, which was guaranteed by the Supreme Court in January 1973. Although the member organizations hold widely varying views on *when* abortion is a moral alternative, all are agreed that individuals must have the right to make decisions concerning abortion based on their own conscience and religious beliefs, and in accordance with responsible medical practice.

The Coalition opposes efforts to prohibit or restrict access to legal abortion, either through constitutional amendment or through federal, state or local legislation. Individuals may support Coalition activities by participating in its nationwide legislative alert network (Dispatch), by subscribing to its monthly newsletter *(Options)*, and by working with its state affiliates.

For further information, please contact the Coalition office.

Religious Coalition for Abortion Rights
100 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 543-7032

HOW WE STAND
The Positions on Abortion of 27 National Religious Organizations
(Published by the Religious Coalition for Abortion Rights, 1979)

RELIGIOUS COALITION FOR ABORTION RIGHTS

STATEMENT OF PURPOSE

The Religious Coalition for Abortion Rights is an organization of national religious bodies which, on the basis of faith and moral conviction and in the light of constitutional guarantees of privacy and religious freedom, seeks to encourage and coordinate support for safeguarding the legal option of abortion; for ensuring the right of individuals to make decisions concerning abortion in accordance with their consciences and responsible medical practice; and for opposing efforts to deny these rights through constitutional amendment, or federal and state legislation.

RATIONALE

Many religious organizations representing diverse denominations have adopted the position that decisions concerning abortion should be made according to individual conscience, consistent with responsible medical practice, free from the threat of criminal penalty.

The 1973 Supreme Court decision of *Roe v. Wade* made abortion a legal medical procedure. The Court ruled that abortion during the first trimester of pregnancy may be determined by the woman and her physician; abortion during the second trimester may be regulated by the state

in order to protect the woman's life and health; and abortion during the third trimester may be prohibited by the state, except when necessary to preserve the life or health of the woman. National polls taken on the issue of abortion indicate that the majority of Americans support this decision.

However, a vocal minority would deny the option of legal abortion to all. Their personal belief that human life exists from the moment of conception has prompted their efforts to nullify the Supreme Court decision through a Constitutional amendment which would prohibit legal abortion altogether, and through federal, state and local legislation which would restrict access to abortion. One theological view would thus become law, binding on Americans of all faiths.

It is vital to increase public awareness of this danger. Enactment of such legislation would violate the religious freedom of every citizen by circumventing the First Amendment guarantee of church-state separation. All concerned with religious liberty must join in opposing this attempt to return us to the era of criminal abortion.

Religious organizations have a unique responsibility to contribute to this effort.

Recognizing that each denomination has its own perspective on when abortion is morally justified, the Religious Coalition for Abortion Rights maximizes the effectiveness of its members by coordinating their efforts to maintain the option of legal abortion. RCAR also cooperates with other national and community organizations which share its goals.

The Coalition is directed by an inter-religious policy committee and served by a full-time staff. In addition to a

Washington office, it includes state affiliates throughout the country, and is thus active on the national, state and local levels.

AMERICAN BAPTIST CHURCHES[1]

Because Christ calls us to affirm the freedom of persons and the sanctity of life, we recognize that abortion should be a matter of responsible personal decision. To this end we as American Baptists urge that legislation be enacted to provide:

1. That the termination of a pregnancy prior to the end of the 12th week (first trimester) be at the request of the individual(s) concerned and be regarded as an elective medical procedure governed by the laws regulating medical practice and licensure.
2. After that period the termination of a pregnancy shall be performed only by a duly licensed physician at the request of the individual(s) concerned, in a regularly licensed hospital, for one of the following reasons as suggested by the Model Penal Code of the American Law Institute:
   a. When document evidence exists that this is a danger to the physical or mental health of the woman;
   b. When there is documented evidence that the conceptus has a physical or mental defect;
   c. When there is documented evidence that the pregnancy was the result of rape, incest or other felonious acts.

[1]Adopted by the Annual Meeting of the American Baptist Convention, May, 1968.

Further we encourage our churches to provide sympathetic and realistic counseling on family planning and abortion.

We recommend study, research and development of understanding on the part of the populace led by the people of our churches toward an enlightened view of this provocative problem.

AMERICAN ETHICAL UNION[2]

The American Ethical Union, a federation of ethical-humanist societies, disapproves of efforts to amend or circumvent the United States Constitution to nullify or impede the decision of the United States Supreme Court regarding abortion.

Abridgement of individual civil and human liberties as guaranteed by the United States Constitution is a danger to all. Among those liberties that must continue free of threat is the right of every woman to self-determination insofar as continued pregnancy is concerned.

NATIONAL WOMEN'S CONFERENCE AMERICAN ETHICAL UNION

The National Women's Conference of the American Ethical Union, an ethical-humanist religious organization, believes in the right of each individual to exercise his or her conscience; every woman has a civil and human right to determine whether or not to continue her pregnancy. We support the decision of the United States Supreme Court of January 22, 1973 regarding abortion.

[2]Adopted by the Annual Assembly of the American Ethical Society, June, 1976.

We believe that no religious belief should be legislated into the legal structure of our country; the state must be neutral in all matters related to religious concepts.

We believe that the First Article of the Bill of Rights guaranteeing separation of church and state should be rigorously observed so that religious freedom will be ensured to all.

Furthermore, we believe all attempts to amend the Constitution which would dilute that freedom in any manner will undermine other fundamental rights in the U.S. Constitution.

AMERICAN HUMANIST ASSOCIATION[3]

The American Humanist Association reaffirms the ethical and moral responsibilities of all humanist parents to avoid bringing into this world children who are not wanted; to avoid bringing children into an environment of neglect and abuse; to assure that children are well-born; and to provide an affectionate, loving and healthy environment for all children that they may enjoy an equal opportunity to realize the fullness and uniqueness of their own humanity.

We affirm the moral right of women to become pregnant by choice and to become mothers by choice. We affirm the moral right of women to freely choose a termination of unwanted pregnancies. We oppose actions by individuals, organizations and governmental bodies that attempt to restrict and limit the woman's moral right and obligation of responsible parenthood.

[3]Adopted by the Annual Meeting of the American Humanist Association, May, 1977.

We also affirm the right and moral responsibility of parents and future parents to be free from ignorance on matters of human sexuality and to have access to contraceptive methods in order to prevent unwanted pregnancies and abortions; and to avoid the spread of venereal disease.

We hold these moral rights of responsible parenthood as part of our humanistic religious heritage and consider infringements upon these moral rights as an infringement upon the free exercise of our humanistic religious principles as guaranteed by the First Amendment to the Constitution of the United States.

AMERICAN JEWISH CONGRESS[4]

The American Jewish Congress expresses its total support for the decisions of the United States Supreme Court of January 1973 interpreting the Bill of Rights as restricting legislation limiting the right of a woman to choose whether to bear a child. We oppose efforts to nullify those decisions, through the adoption of constitutional amendments or through the enactment of legislative riders barring the use of government funds for the performances of abortions which a woman and her doctor believe should be performed.

We respect the religious and conscientious scruples of those who reject the practice of abortion. However, to the extent that they would embody those scruples in law binding on all, we oppose them.

There is now a powerful drive to discredit the Supreme Court decisions. The answer must be equally powerful.

[4]Adopted by the Biennial Convention of the American Jewish Congress, April, 1976.

Accordingly, we pledge ourselves to effective educational efforts to ensure that Americans understand how the drive for anti-abortion laws would impair the basic rights of religious freedom, privacy and equality.

B'NAI B'RITH WOMEN[5]

Although we recognize there is a great diversity of opinion on the issue of abortion, we also underscore the fact that every woman should have the legal choice with respect to abortion consistent with sound medical practice and in accordance with her conscience.

We wholeheartedly support the concepts of individual freedom of conscience and choice in the matter of abortion. Any constitutional amendment prohibiting abortion would deny to the population at large their basic rights to follow their own teachings and attitudes on this subject which would threaten First Amendment rights. Additionally, legislation designed to ban federal funding for health facilities for abortions is discriminatory, since it would affect disadvantaged women, who have no access to expensive private institutions.

Since our earlier resolution regarding a woman's right to an abortion was approved before the historic Supreme Court decision of 1973 (*Roe v. Wade*) which guaranteed this option, we herewith declare our staunch support of said decision.

We continue to urge our membership at every level to join community and organizational efforts to oppose all legislation and constitutional amendments which would

[5]Adopted by the Biennial Convention of B'nai B'rith Women, March, 1976.

seek to overturn or nullify the 1973 Supreme Court decision.

CATHOLICS FOR A FREE CHOICE[6]

Catholics for a Free Choice is a national organization of Catholics dedicated to the principle that women have the right and duty to follow their conscience regarding decisions on contraception and termination of pregnancy; and that the law has a corresponding right and duty to make it possible for them to implement those choices under medically safe conditions.

We affirm the religious liberty of Catholic women and men and those of other religions to make decisions regarding their own fertility free from church or governmental interventions in accordance with their own individual conscience.

CHRISTIAN CHURCH (DISCIPLES OF CHRIST)[7]

WHEREAS, the Christian Church (Disciples of Christ) has proclaimed that in Christ, God affirms freedom and responsibility for individuals, and

WHEREAS, legislation is being introduced in the U.S. Congress which would embody in law one particular opinion concerning the morality of abortion which would limit each individual's freedom and responsibility in such matters.

[6]Position statement of Catholics For a Free Choice, June, 1975.

[7]Adopted by the Fourth Biennial General Assembly of the Christian Church (Disciples of Christ), August, 1975.

THEREFORE BE IT RESOLVED, that the General Assembly of the Christian Church (Disciples of Christ) meeting at San Antonio, Texas, August 15-20, 1975.

1. Affirm the principle of individual liberty, freedom of individual conscience, and sacredness of life for all persons.
2. Respect differences in religious beliefs concerning abortion and oppose, in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans,
3. Provide through ministry of the local congregation, pastoral concern, and nurture of persons faced with the responsibility and trauma surrounding undesired pregnancy.

EPISCOPAL WOMEN'S CAUCUS[8]

WHEREAS, we are deeply disturbed over the increasingly bitter and divisive battle being waged in legislative bodies to force continuance of unwanted pregnancies and to limit an American woman's right to abortion; and

WHEREAS, we believe that all should be free to exercise their own consciences on this matter and that where widely differing views are held by substantial sections of the American religious community, the particular belief of one religious body should not be forced on those who believe otherwise; and

WHEREAS, to prohibit or severely limit the use of public funds to pay for abortions abridges and denies the right to an abortion and discriminates especially against low income, young and minority women; therefore be it

[8]Adopted by the Annual Meeting of the Episcopal Women's Caucus, April, 1978.

RESOLVED, that the Episcopal Women's Caucus affirms the position of the 1976 General Convention of the Episcopal Church in expressing its "unequivocal opposition to any legislation on the part of national or state governments which would abridge or deny the right of individuals to reach informed decisions on this matter and to act upon them."; and be it further

RESOLVED, that the Episcopal Women's Caucus urges its members to actively work to assure the continuance of federal, state and local funds for abortion.

NATIONAL COUNCIL OF JEWISH WOMEN[9]

The National Council of Jewish Women believes that the freedom, dignity and security of the individual are basic to American democracy, that individual liberty and rights guaranteed by the Constitution are keystones of a free society, and that any erosion of these liberties or discrimination against any person undermines that society.

It is resolved . . . To promote public understanding that abortion is an individual right and to work to eliminate any obstacles that limit this right.

NATIONAL FEDERATION OF TEMPLE SISTERHOODS[10]

The National Federation of Temple Sisterhoods affirms our previously adopted strong support for the right of a woman to obtain a legal abortion, under conditions now outlined in the 1973 decision of the United States Supreme

[9]Adopted by the Biennial Convention of the National Council of Jewish Women, 1969; reaffirmed, 1977.

[10]Adopted by the Biennial Assembly of the National Federation of Temple Sisterhoods, November, 1975.

Court. The Court's position established that during the first two trimesters, the private and personal decision of whether or not to continue to term an unwanted pregnancy should remain a matter of choice for the woman; she alone can exercise her ethical and religious judgment in this decision. Only by vigorously supporting this individual right to choose can we also ensure that every woman may act according to the religious and ethical tenets to which she adheres.

We oppose laws which would remove abortion from the category of medical assistance, as well as any discriminatory laws which would effectively prevent women from making the choice which is their right, by denying them access to proper medical care.

NFTS reaffirms our commitment to "Taharat Hamishpachah" — the purity of the family — and supports the dissemination of birth control information, as well as other education for family planning as a contribution to responsible family life. Such education and parallel efforts to eradicate ignorance and poverty would substantially reduce the need to make the choice for abortion.

PRESBYTERIAN CHURCH IN THE U.S.[11]

1) Induced abortion is the willful destruction of the fetus. Therefore, the decision to terminate a pregnancy should never be made lightly or in haste.

2) The willful termination of pregnancy by medical means on the considered decision of a pregnant woman may on occasion be morally justifiable. Possible justifying circumstances would include medical indications of

[11]Adopted by the General Assembly of the Presbyterian Church in the U.S., 1970.

physical or mental deformity, conception as a result of rape or incest, conditions under which the physical or mental health of either mother or child would be gravely threatened, or the socio-economic condition of the family. The procedure should be performed only by licensed physicians under optimal conditions, and with appropriate medical consultation and ministerial counseling, preferably with her own minister.

3) Laws concerning abortion should reflect principles set forth in this paper.

4) Medical intervention should be made available to all who desire and qualify for it, not just to those who can afford preferential treatment.

5) The church should develop a greater pastoral concern and sensitivity to the needs of persons involved in "problem pregnancies." Such persons should be aided in securing professional counseling about the various alternatives open to them in order that they may act responsibly in the light of their moral commitments, their understanding of the meaning of life, and their capacities as parents.

UNION OF AMERICAN HEBREW CONGREGATIONS[12]

The UAHC reaffirms its strong support for the right of a woman to obtain a legal abortion on the constitutional grounds enunciated by the Supreme Court in its 1973 decision in *Roe v. Wade,* 410 U.S. 113 and *Doe v. Bolton,* 410 U.S. 179 which prohibit all governmental interference in abortion during the first trimester and permits only those regulations which safeguard the health of the woman dur-

[12]Adopted by the General Assembly of the Union of American Hebrew Congregations, November, 1975.

ing the second trimester. This rule is a sound and enlightened position on this sensitive and difficult issue, and we express our confidence in the ability of the woman to exercise her ethical and religious judgment in making her decision.

The Supreme Court held that the question of when life begins is a matter of religious belief and not medical or legal fact. While recognizing the right of religious groups whose beliefs differ from ours to follow the dicates of their faith in this matter, we vigorously oppose the attempts to legislate the particular beliefs of those groups into the law which governs us all. This is a clear violation of the First Amendment. Furthermore, it may undermine the development of interfaith activities. Mutual respect and tolerance must remain the foundation of interreligious relations.

We oppose those riders and amendments to other bills aimed at halting medicaid, legal counselling and family services in abortion-related activities. These restrictions severely discriminate against and penalize the poor who rely on governmental assistance to obtain the proper medical care to which they are legally entitled, including abortion.

We are opposed to attempts to restrict the right to abortion through constitutional amendments. To establish in the Constitution the view of certain religious groups on the beginning of life has legal implications far beyond the question of abortion. Such amendments would undermine constitutional liberties which protect all Americans.

In keeping with the spirit of this resolution and to actualize its aims, we join with the Central Conference of American Rabbis in urging Reform Jews and their national and local institutions to cooperate fully with the Religious Coalition for Abortion Rights.

UNITARIAN UNIVERSALIST ASSOCIATION
UNITARIAN UNIVERSALIST WOMEN'S FEDERATION[13]

WHEREAS, attempts are now being made to deny Medicaid funds for abortion and to enact Constitutional amendments that would limit abortions to life-endangering situations and thus remove this decision from the individual and her physicians; and

WHEREAS, such legislation is an infringement of the principle of the separation of church and state as it tries to enact a position of private morality into public law; and

WHEREAS, such anti-abortion legislation would cause the revival of illegal abortion and result in the criminal exploitation of women who are without money or influence forcing them to resort to unsafe procedures; and

WHEREAS, we affirm the right of each woman to make the decisions concerning her own body and future and we stress the responsibilities and long-term commitment involved in the choice of parenthood,

WHEREAS, the majority of the Supreme Court has ruled on June 20, 1977 that the states are not obligated to expend Medicaid funds for elective abortions, and has also ruled that public hospitals are not obligated to perform abortions,

WHEREAS, there is a strong national movement to have 2/3 of the state legislatures request Congress to convene a constitutional convention for the purpose of proposing a constitutional amendment to prohibit abortion.

THEREFORE, BE IT RESOLVED: That the 1977 General Assembly of the Unitarian Universalist Association expresses its dismay and regret at the June 20, 1977 decision of the Supreme Court as seriously jeopardizing the right of legal abortion won in the Supreme Court decisions of January 1973, opposes the denial of Medicaid funds for abortions and any constitutional amendment prohibiting abortion, and urges members of the societies of the Unitarian Universalist Association to write or wire their Representatives and Senators in Congress and State legislatures to inform them of our position on these issues.

[13]Adopted by the 16th General Assembly of the Unitarian Universalist Association, June, 1977.

THEREFORE, BE IT RESOLVED: that the 1977 General Assembly of the Unitarian Universalist Association goes on record as opposing the calling of a national constitutional convention for the purpose of amending the Constitution to prohibit abortion.

BE IT FURTHER RESOLVED, That the 1977 General Assembly positively admits its respect for the responsibilities and joys of parenthood, and the member societies of the Unitarian Universalist Association are encouraged to develop workshops and other programs on parenthood and parenting.

BE IT FURTHER RESOLVED, that the 1977 General Assembly urges that federal funds be invested in research to find more effective and safer methods of birth control.

UNITED CHURCH OF CHRIST[14]

The theological and scientific views on when human life begins are so numerous and varied that one particular view should not be forced on society through its legal system.

[14]Adopted by the Eighth General Synod of the United Church of Christ, June, 1971; reaffirmed by the 11th General Synod, June, 1977.

Present laws prohibiting abortion are neither just nor enforceable. They compel women either to bear unwanted children or to seek illegal abortions regardless of the medical hazards and suffering involved. By severely limiting access to safe abortions, these laws have the effect of discriminating against the poor.

The mere liberalization of the laws have not proven to be a viable solution to the problem of illegal abortions. The liberalized laws tend to cause more rigidity and narrowness of interpretation, and, in any case, cannot cover all circumstances in which an abortion may be appropriate.

For these reasons, the Eighth General Synod of the United Church of Christ calls for the repeal of all legal prohibitions of physician-performed abortions. This would take abortion out of the realm of penal law and make voluntary and medically safe abortions legally available to all women. Simultaneously we ask that adequate protection be given to "conscientious objectors" against abortion, including physicians, nurses, and prospective mothers . . .

(The 11th General Synod) . . . Deplores the June 20, 1977 decision of the U.S. Supreme Court and recent actions of the U.S. Congress that effectually deprive the poor of their Constitutional rights of choice to end or complete a pregnancy, while leaving the well-to-do in the full enjoyment of such rights.

UNITED METHODIST CHURCH[15]

Resolution on Responsible Parenthood

We affirm the principle of responsible parenthood . . . . the decision whether or not to give birth to children must include acceptance of the responsibility to provide for their mental, physical, and spiritual growth, as well as consideration of the possible effect on quality of life for family and society.

When, through contraceptive or human failure, an unacceptable pregnancy occurs, we believe that a profound regard for unborn human life must be weighed alongside an equally profound regard for fully developed personhood, particularly when the physical, mental, and emotional health of the pregnant woman and her family show reason to be seriously threatened by the new life just forming. We reject the simplistic answers to the problem of abortion, which on the one hand regard all abortions as murders, or on the other hand, regard abortions as medical procedures without moral significance.

When an unacceptable pregnancy occurs, a family, and most of all the pregnant woman is confronted with the need to make a difficult decision. We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such a case, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decisions. We encourage women in counsel with husbands, doctors, and

---

[15]Adopted by the General Conference of the United Methodist Church, 1976.

pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion.

We therefore encourage our churches and common society to:

7. Safeguard the legal option of abortion under standards of sound medical practice, and make abortions available to women without regard to economic status.

Statement of Social Principles

The beginning of life and the ending of life are the God-given boundaries of human existence. While individuals have always had some degree of control over when they would die, they now have the awesome power to determine when and even whether new individuals will be born. Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion. We call all Christians to a searching and prayerful inquiry into the sorts of conditions that may warrant abortion. We support the legal option of abortion under proper medical procedures . . . .

WOMEN'S DIVISION
BOARD OF GLOBAL MINISTRIES
UNITED METHODIST CHURCH[16]

As members of the Women's Division of the Board of Global Ministries, we are deeply disturbed over the increasingly bitter and divisive battle being waged to place an amendment in the U.S. Constitution to ban abortion.

We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise.

In 1969 the Women's Division first took the step of calling for the removal of abortion from the criminal code, putting its regulation instead under standard codes of medical practice. In 1970 this position was adopted by the General Conference and in 1972 it was reaffirmed in the Social Principles of our denomination, which states that "in continuity with past Christian teachings, we recognize tragic conflicts of life with life that may justify abortion." This position is in accord with that of many other major Protestant denominations and Jewish faith communities.

When the Supreme Court decision of January 1973 made possible the legal option of abortion in all states, we hoped that all those concerned with this problem could turn their attention to seeking to remove conditions in our society which might create a need for abortion, such as faulty contraceptives, lack of education on responsible

[16]Adopted by the Spring Meeting of the Women's Division of the Board of Global Ministries, United Methodist Church, April, 1975.

sexuality, lack of access to family-planning services, tragedies such as rape, incest and genetic defects.

Now we find, instead that vast amounts of energy, money and time are going to the attempt to use national legislation and even the Constitution to force continuation of pregnancies, no matter what the human or social cost. Various kinds of legal and social pressures are being used to intimidate doctors and hospitals who are involved in abortion.

Amendments which prohibit or restrict abortion rights are being proposed for a number of health related bills. If such legislation is approved the most direct effect would be against the poor who cannot afford to travel to the places where safe legal abortions are available. These women then become targets for exploitation by unskilled abortionists working in unsanitary and illegal facilities.

We affirm our belief in freedom of conscience on this matter. We are concerned about those who have been bitterly attacked for seeking to deal openly with this issue in a spirit of compassion. Although we respect the right of other religious individuals and groups to disagree on the matter of abortion, we earnestly make the appeal that our differences be embued with a spirit of ecumenical relationships.

Conclusion

The struggle raging over abortion centers largely on religious and philosophical differences rather than on the types of social factors which normally fall within the purview of government. We, therefore, affirm once more our belief that where there is no religious or moral consensus in our society, the attempt to embody one particular moral viewpoint in the United States Constitution does serious

injury to our cherished freedom of religious belief and conscience.

UNITED PRESBYTERIAN CHURCH, USA[17]

WHEREAS, God has given persons the responsibility of caring for creation as well as the ability to share in it, and has shown his concern for the quality and value of human life; and

WHEREAS, sometimes when the natural ability to create life and the moral and spiritual ability to sustain it are not in harmony, the decisions to be made must be understood as moral and ethical ones and not simply legal; and

WHEREAS, society now provides minimal care for unwanted children and inadequate support systems for women with children; and

WHEREAS, Most present abortion laws are inadequate and morally and ethically unjustifiable because: (a) the laws do not deal with the problem of the bodily rights of women nor affirm thei. life and health; (b) the laws do not grant women the right not to bear unwanted children; (c) the laws do not deal with the emotional, social, or economic welfare of other members of a family into which an unwanted child may be born; (d) the laws fail to solve the problem of illegal abortions but leave the problem to be handled by criminals, quack practitioners, and a small number of reputable physicians willing to risk their practice and reputation by performing abortion; (e) the laws do not relieve the burden which the present structure places on the poor and on those who are unsophisticated

[17]Adopted by the 184th General Assembly of the United Presbyterian Church, U.S.A., May, 1972.

about the ways of medicine and the law; and (f) the laws do not insure the right of all children to be born as wanted children;

THEREFORE, In support of the concern for the value of human life and human wholeness and for the freedom of choice advocated in the report, "Sexuality and the Human Community," received for study by the 182nd General Assembly (1970), in support of the call to repeal inadequate abortion laws approved by that General Assembly (see *Minutes,* 1970, Part I, p. 891), and in support of the resolution passed by United Presbyterian Women (1970), the 184th General Assembly (1972):

a. Urges the development, support, and expansion of agencies where women with problem pregnancies have assistance and counseling on options such as keeping the child, adoption alternatives, and abortion, with future access to birth control methods. As part of the counseling process, it urges consideration of the feelings of the father and the family.

b. Declares that women should have full freedom of personal choice concerning the completion or termination of their pregnancies and that the artificial or induced termination of pregnancy, therefore, should not be restricted by law, except that it be performed under the direction and control of a properly licensed physician.

c. Continues to support the establishment of medically sound, easily available and low-cost abortion services.

d. Urges the church to demonstrate its concern for women with small children by encouraging (1) the support of prenatal care for all pregnant women, (2)

the principle that all children are legitimate at birth, (3) the establishment of support groups for single women who elect to keep their children, and (4) the formation of high quality child development centers.

e. Supports legislation to repeal abortion laws not in harmony with this statement and encourages responsible groups working for such repeal.

f. Urges the development and dissemination of Biblical and theological materials on the issue of abortion in order to facilitate responsible dialogue.

g. Directs the Stated Clerk of the General Assembly to urge synods and presbyteries to study and take appropriate action on the issue of abortion in line with sections a through f above, including training opportunities for pastors and laypersons in counseling on problem pregnancies.

h. Directs the Stated Clerk of the General Assembly to request seminaries to include appropriate consideration of the issue of abortion in courses in pastoral counseling and social ethics as well as in continuing education programs offered to clergy, and to request church-related colleges to consider the issue of abortion in appropriate courses, programs, or counseling services.

UNITED SYNAGOGUE OF AMERICA[18]

In 1967 the Metropolitan Region of the United Synagogue of America presented testimony in favor of abortion law reform before a committee of the New York State Legislature. In this testimony, reflecting the views

[18]Adopted by the Biennial Convention of the United Synagogue of America, November, 1975.

of the Law Committee of the Rabbinical Assembly as well, the United Synagogue said:

> "Rabbinic law holds that 'the mother has theoretical power over the foetus as part of herself.' She must, however, have valid and sufficient warrant for depriving it of potential life. The Talmud and subsequent rabbinic response throughout the centuries have ruled on what is or is not adequate warrant.
>
> "In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat of her life. To go a step further, a classical responsum places danger to one's psychological health, when well established, on an equal footing with a threat to one's physical health. Although the definition and determination of the seriousness of these threats are subject to detailed and specific discussion, the principle is none the less clear."

The United Synagogue of America reaffirmed this position in a later statement issued by the presidents and executive vice-presidents of the United Synagogue of America and the Rabbinical Aseembly emphasizing that abortions, "though serious even in the early stages of conception, are not to be equated with murder, hardly more than is the decision not to become pregnant."

Since then the United States Supreme Court prohibited all governmental interference in abortion during the first trimester and permitted those regulations which safeguard the health of the woman during the second trimester. The court held that whether or not to terminate an unwanted pregnancy during the first two trimester remains a matter of choice for the woman.

The United Synagogue affirms once again its position that "abortions involve very serious psychological, religious, and moral problems, but the welfare of the mother must always be our primary concern" and urges its congregations to oppose any legislative attempts to weaken the force of the Supreme Court's decisions through constitutional amendments or through the deprivation of medicaid, family services and other current welfare services in cases relating to abortion.

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM[19]

National Women's League believes that freedom of choice as to birth control and abortion is inherent in the civil rights of women.

We believe that all laws infringing on these rights should be repealed, and we urge our Sisterhoods to work for the implementation of this goal.

YOUNG WOMEN'S CHRISTIAN ASSOCIATION, U.S.A.[20]

In the 24th National Convention of the YWCA of the U.S.A. in Boston, Mass., April, 1967, the delegates voted to work to liberalize the abortion laws, and in the following three year period many YWCAs studied the issues, attended hearings in their State Capitals, and kept in touch with the results of liberalization. Across the country, members became convinced that repeal of abortion laws was the answer because laws with specifications can

---

[19]Adopted by the Biennial Convention of the Women's League for Conservative Judaism, November, 1974.

[20]Adopted by the National Board of the Young Women's Christian Association of the U.S.A., December, 1973.

discriminate against the poor who cannot afford to travel to places where legal, safe abortions are available. These women are at the mercy of unskilled abortionists working under unsanitary facilities.

The decision to give emphasis to the repeal of all laws restricting or prohibiting abortions performed by a duly licensed physician was voted in the 25th National Convention of the YWCA of the U.S.A. in Houston, Texas, in April, 1970. Delegates representing 48 states were selected by their local Associations, and voting delegates were empowered to cast their votes, keeping in mind the best interests of the total YWCA. The decision to support repeal of restrictive abortion laws was passed unanimously.

In the 26th National Convention in San Diego in March, 1973, delegates voted to "support efforts to provide safe, low-cost abortions to all women who desire them."

In line with our Christian Purpose, we, in the YWCA, affirm that a highly ethical stance is one that has concern for the quality of life of the living as well as for the potential for life. We believe that a woman also has a fundamental, constitutional right to determine, along with her personal physician, the number and spacing of her children. Our decision does not mean that we advocate abortion as the most desirable solution to the problem, but rather that a woman should have the right to make the decision. Along with the YWCA, many religious, social work and medical groups have endorsed repeal of abortion laws because this makes it possible for a woman to have access to safe medical service if this seems the solution that she and her physician decide upon. This point of view is taken by many women who themselves would not seek an abortion.

Because the YWCA voted as its overall imperative to work to eliminate racism wherever it occurs in institutions, it has a concern that no woman should be deprived of services that others can have, but it also is concerned that no woman be pressured into decisions which are not in their best personal interest.

MOTION FILED
MAR 19 1980

No. 79-1268

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1268

PATRICIA HARRIS, Secretary, United States Department of Health, Education and Welfare,

Appellant,

-and-

SENATOR JAMES L. BUCKLEY, et al.,

Intervenor-Appellants

v.

CORA MC RAE, et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of New York

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE and BRIEF OF AMICI CURIAE

RANDALL W. WESTREICH
90 Culberson Road
Basking Ridge, N.J.

NADINE TAUB
15 Washington Street
Newark, N.J.

DAVID BEN ASHER
Attorney for Essex County Executive
Hall of Records
Newark, N.J.

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
Motion	2
Brief:	
Statement of Interest	6
Legal Argument: THE GOVERNMENT CANNOT ESTABLISH A COMPREHENSIVE PROGRAM OF MEDICAL ASSISTANCE FOR THE NEEDY COVERING ALL MEDICALLY NECESSARY SERVICES EXCEPT FOR MEDICALLY NECESSARY ABORTIONS	
A. RATIONALITY	10
B. PENALTY	13
C. EFFECT	15
Conclusion	21

CITATIONS

Cases

Colautti v. Franklin, 439 U.S. 379 (1979)..... 12

Doe v. Percy, 476 F. Supp. 324 (W.D. Wisc. 1979)..... 13

Doe v. Wade, 410 U.S. 179 (1973)..... 19

Eastern Kentucky Welfare Rights Organization v. Simon, 506 F.2d 1278 (D.C. Cir. 1974) vac. and remanded for dismissal on o.g. 426 U.S. 26 (1976)..... 19

Maher v. Roe, 432 U.S. 464 (1977).... .....11, 13, 14 ,18

McRae v. Secretary of Health, Education and Welfare, 76 C 1804 (U.S.D. Ct. ED. N.Y. Jan. 10, 1980) Probable Juris. noted 48 U.S.L.W. 3546 (Feb. 12, 1980)...15, 16, 17, 18, 19, 20

Planned Parenthood v. Rhodes, 477 F. Supp. 529 (E.D. Ohio 1979)..... 15

Reproductive Health Services v. Freeman, 79-1245 (8th Cir. Jan. 9, 1980) 15

Right to Choose v. Byrne, 169 N.J. Super 543 (Ch. 1979) 15, 19

Right to Choose v. Byrne, 165 N.J. Super 443, (Ch. 1979) 18

Roe v. Wade, 410 U.S. 113 (1973)..... 12

SanAntonio School District v. Rodriguez, 411 U.S. 1 (1973) 13

Williams v. Zbaraz---U.S.---, 60 L.Ed. 2d (May 24, 1979) 13

Women's Health Services, Inc. v. Maher, Cir. No. H-79-405 (D. Conn. Jan. 7, 1980) 15, 16, 17, 19

Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979) Probable Juris. noted 48 U.S.L.W. 3356 (Nov. 26, 1979)..... 15, 20

Statutes, Constitution

N.J.S.A. 40:41A-36 (c) (j) 8

P.L. 95-480 § 210, 92 Stat. 1586 11

P.L. 96-123, § 109 11

42 U.S.C. § 300k..... 2, 6, 7

42 U.S.C. § 300L. 6

42 U.S.C. § 1396 et seq. 10

U.S. Constitution, Amendment 14 11

Other Authorities

Blendon, Robert, National Health Insurance: What Will be the Impact on Private Philanthropy, Vol. 16, No. 2, Foundation News. 19

Blendon, Robert, Changing Role of Private Philanthropy in Health Affairs, 292 N.E. Journal of Medicine, pp. 946-50, May 1975 19

Alan Guttmacher Institute, Abortion: Need Services v. Policies: New Jersey (1980) 3, 8, 17, 21

Note, Abortion, Medicaid and the Constitution, 54 N.Y.U. L. Rev. 120 (1979) 14

New Jersey Department of Health, 1977, New Jersey Health Statistics 8, 9

Smolenski, Principles of Community Health (1977) 8

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1268

PATRICIA HARRIS, Secretary, United States Department of Health, Education and Welfare,

Appellant,

-and-

SENATOR JAMES L. BUCKLEY, et al.,

Intervenor-Appellants

v.

CORA MC RAE, et al.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency (HSAs) and the Essex County Executive, Peter Shapiro, hereby respectfully move to file the attached brief amici curiae in this case.

The consent of the appellant's attorneys was requested and granted. Consent of the appellees' attorneys was requested and granted. Consent of the attorney for intervenor-appellant, Pernicone, was requested and granted. Consent of the attorney for intervenor-appellants Buckley, Hyde, and Helms, was requested but refused.

Bergen-Passaic Health System Agency, Hudson Health Systems Agency, Southern New Jersey Health Systems Agency, are established pursuant to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300 k. et. seq.

Their interest in the present litigation arises from the fact that they, as statutorily established bodies, having as their primary responsibility, the planning of all necessary health related services for their residents.

One question the Court will address is the constitutionality of the removal of a large class of "medically necessary" abortions from Medicaid coverage. The impact of this removal upon the health planning needs of these areas, and upon the health of its citizens requiring abortions, particularly with regard to the accessibility of adequate facilities, is a subject which is particularly suited to the interests of amici HSAs. Abortion services are an integral part of compre-

hensive family planning and maternal and child care. See Alan Guttmacher Institute, Abortion: Need Services and Policies: New Jersey (1980) p. 33.

Essex County Executive is the executive of the County. He is charged with the duty of ensuring that all terms imposed in favor of the County or its inhabitants in any statute are faithfully kept and performed. The County Executive seeks to discharge that duty by appearing amicus curiae in the Court's consideration of the constitutionality of Hyde Amendment which prevents Essex County's indigent residents from securing all medically necessary services.

The brief which the amici curiae are requesting permission to file will contain a more complete argument addressed to accessibility and its consequences which the HSAs and the Essex County Executive are in a position to specifically address. This practical aspect of the issue is a critical one for those charged with obtaining equal access to quality health care.

Respectfully submitted,

RANDALL W. WESTREICH
90 Culberson Road
Basking Ridge, N.J.

NADINE TAUB
15 Washington Street
Newark, N.J.

Attorneys for Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency

DAVID BEN ASHER
Hall of Records
Newark, N.J.

Attorney for Essex County Executive, Peter Shapiro

March 13, 1980

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1268

PATRICIA HARRIS, Secretary, United States Department of Health, Education and Welfare,

Appellant,

-and-

SENATOR JAMES L. BUCKLEY, et al.,

Intervenor-Appellants,

v.

CORA MC RAE, et al.,

Appellees.

BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST

Health Systems Agencys (HSAs) are private non-profit corporations enacted pursuant to 42 U.S.C. § 300k. et. seq., National Health Planning & Resources Development Act of 1974. They are part of a statewide system of health planning established by federal law. There are five HSAs in the State of New Jersey, three of them are joining in the filing of this amicus brief: Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency.

For the purpose of:--

(1) improving the health of the residents of a health service area,

(2) increasing accessibility, acceptability and continuity and quality of the services,

(3) restraining costs, and

(4) preventing duplication,

each H.S.A. has as its primary responsibility the provision of effective health planning for its area and the promotion of the development within the area, manpower, and facilities which meet identifiable needs and reduce inefficiencies.

42 U.S.C. § 300 1-2.

To this end, the H.S.A.s make yearly plans to assess the health needs of the area and to determine how they are met.

All this data is further developed in a statewide plan.

These health planning bodies are interested in ensuring that all medically necessary services are provided to satisfy the needs of their areas. Abortion services are an integral part of this planning and health care.

The agencies are concerned that the majority of medically necessary abortions may be arbitrarily removed as a Medicaid service, thereby leaving their areas without the means and facilities to provide for indigent women whose health needs require abortions. The result of such a removal of services would be a denial of access, and increased expenses to the women who are defined as categorically needy. Unable to meet these expenses, and absent the existence of charities, the resulting situation would appear to be: increased serious health risks for the woman if no abortion were obtained or if an abortion is deferred until it is life-threatening, or alternatively, increased health risks resulting from obtaining illegal or self-induced abortions.

All these results are contrary to the over-all priority goal of the H.S.A.s and the act which attempts to achieve equal access to quality health care. See 42 U.S.C. § 300k.

Finally, if medically necessary abortions are not covered by the existing Medicaid structure, this will create the need for duplication of these services for the poor women without adequate funds,

which will, in turn, increase medical costs generally.

> To improve accessibility of abortion services to poor women, it is necessary that public (Medicaid) funding for abortion services be available throughout the State.

Alan Guttmacher Institute, Abortion: Need Services, and Policies: New Jersey (1980) p. 34.

Essex County Executive is charged with the duty of enforcing all laws applicable to the County and of ensuring that all terms imposed in favor of the county or its inhabitants in any statute are faithfully kept and performed. N.J.S.A. 40:41A-36 (c)(j). In the instant case, the County Executive seeks to fulfill those duties by appearing amicus curiae in the Court's consideration of the constitutionality of the Hyde Amendment which prevents Essex County's indigent residents from securing all medically necessary services.

The impact of Hyde Amendment is particularly acute in Essex County where over 15% of population is dependent on Medicaid to secure medically necessary services. The health problems in Essex County are demonstrated by the fact that its maternal mortality rate is twice the "acceptable" national rate and three times the maternal mortality rate for the State of New Jersey. New Jersey Department of Health, 1977, N.J. Health Statistics, J. Smolenski, Principles of

Community Health (1977). From 1975 to 1977 when State legislation, which was recently invalidated in Right to Choose v. Byrne, 165 N.J. Super 443 (Ch. 1979), proscribed funding for all but life endangering abortions, the maternal mortality rate nearly doubled. N.J. Health Statistics, supra.

In light of the negative impact which lack of funding for medically necessary abortions will have on the existing health problems in Essex County and in light of the disproportionate effect, such exclusion would have on the poor residents of the County who have such great health needs and such dependence on government to meet those needs, the Essex County Executive joins as amicus curiae in urging this Court to declare that Medicaid recipients are entitled to the same coverage for those abortions which are medically necessary as is provided by Medicaid for all other medically necessary services.

LEGAL ARGUMENT

THE GOVERNMENT CANNOT ESTABLISH A COMPREHENSIVE PROGRAM OF MEDICAL ASSISTANCE FOR THE NEEDY COVERING ALL MEDICALLY NECESSARY SERVICES EXCEPT FOR MEDICALLY NECESSARY ABORTIONS

A. RATIONALITY

One issue raised in this case is whether the government can establish a comprehensive program of medical assistance for the needy, covering all medically necessary services except for medically necessary abortions.

The Hyde Amendment is the exception to a federal-state scheme known as Medicaid, which has as its purpose the coverage of medical assistance to those unable to meet the costs of necessary medical services. 42 USC §§1396 et. seq.

The Hyde Amendment reads as follows:

> ...(N)one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly...; or except in those instances where severe and long-lasting physical health damage to the mother would result if pregnancy were carried to term when so determined by two physicians.

P.L. 95-480 §210, 92 Stat. 1586.

It has been recently amended to exclude the case of abortions necessary to prevent severe and long-lasting physical health damage to the mother. P.L. 96-123 §109.

The Constitution imposes no obligation on the State to pay for pregnancy-related medical expenses of indigent women. Indeed, there is no requirement to pay for any medical expenses. But, when a State decides to provide medical care to alleviate some of the hardships of poverty, the manner with which it dispenses its benefits is subject to constitutional limitations. Maher v. Roe, 432 U.S. 464, 469-70 (1977).

Maher upheld the validity of a statute prohibiting Medicaid funding for elective, i.e., non-therapeutic abortions. In analyzing whether there was any rational basis for this exclusion, the court held that the State's interest in encouraging normal childbirth was a legitimate State interest that was rationally furthered by this legislation. The statute in that case was held not to be violative of the Equal Protection Clause of the Fourteenth Amendment.

While a State can rationally prefer childbirth over the woman's right to control her own body according to Maher, the question here is whether the government can rationally prefer childbirth over a risk to the woman's health.

Crucial to an understanding of the Maher decision is the fact that the Medicaid

recipients sought abortions that their doctors did not deem to be "medically necessary." There was no question that the women seeking abortions in Maher could sustain a normal pregnancy and childbirth. Thus the abortions sought were "unnecessary medical services." Time and time again the Court referred to the State's interest in "encouraging normal childbirth." 432 U.S. at 477, 478, 479. Absent was the need to consider the woman's health.

The most persistent theme in this Court's abortion decisions is the primacy of the woman's health. Roe v. Wade 410 U.S. 113 (1973). This Court recognized the interest in fetal life as constitutionally permissible, but concluded that even at the point of viability the State may not go so far as to proscribe abortion "when (abortion) is necessary to preserve the life or health of the mother." 410 U.S. at 163-4.

The Court strongly implied that the State's interest in preserving the pregnant woman's health--presumably derived from her own interest in preserving her health--was necessarily stronger than the State's interest in protecting the fetus. Certainly, the lesson of Roe is that whatever steps a state takes to promote its interest in protecting fetal life cannot be taken at the expense of the mother. Accord, Colautti v. Franklin 439 U.S. 379 (1979) invalidating an abortion technique which might require a doctor to accept greater risks to maternal health in order to increase the chances of fetal survival.

Nothing this Court has held is to the contrary. Maher is consistent with this

uncompromised theme, because of the absence of health considerations or risk to the mother. Accord, Doe v. Percy, 476 F. Supp. 324 (W.D. Wisc. 1979).

B. PENALTY

The Hyde Amendment sets up two classes of indigent women--those who medically need an abortion and those who need any other medically necessary procedure. Those in the abortion group, although able to demonstrate a medical necessity, cannot obtain the needed medical help unless their situation falls into the narrow confines of the Hyde categories.

Whenever a statute treats different classes of individuals differently, that legislative line-drawing is properly the subject of judicial scrutiny. The statute, in order to pass constitutional muster, must rationally further some legitimate, articulated State purpose. San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973), Maher v. Roe, supra, at p. 497.

The articulated State interest in this case is that upheld in Maher v. Roe, the protection of the fetus through normal childbirth. In sharp contrast to Maher, however, is the fact that we are concerned here with a medical necessity warranting an abortion. Necessarily, the government's interest in childbirth must be diminished by the acknowledged interest in the life of the mother. Williams v. Zbaraz, U.S., 60 L.Ed 2d 1033, 1037 (May 24, 1979), stay denied, Opinion of Stevens, J.

While Maher can be justified on the grounds that the legislature chose a neu-

tral funding criteria--that of medical necessity--as the basis of distributing welfare benefits, no such neutral standard has been used here. Instead, Congress has chosen to provide medical assistance for all purposes except medically necessary abortions. Surely, this act constitutes a penalty. If this case does not present a penalty situation then Congress has the right, for example, to provide campaign financing to all candidates except those who wish to use funds to espouse socialistic ideas, or democratic, as opposed to republican ideas, or any ideas in disfavor with the legislature. The point is, the government may not set up comprehensive funding programs and arbitrarily deny those benefits only to those people who come within the purposes of the program and who seek to constitutionally protect their rights just because of their politically unpopular decision.

For the denial of Medicaid benefits to constitute a penalty, the government must do more than withdraw the cost of exercising the disfavored alternative. Positive detriment must not accrue as a result of embracing the disfavored choice. Maher v. Roe, 432 U.S. at 474, 475-77.

If abortion funding is denied unless the woman's life is imminently threatened, there is a real possibility of serious, long-term health damage occuring because the government discourages the disfavored choice. Certainly this constitutes a penalty upon those seeking to obtain a medically necessary abortion. See Note, Abortion, Medicaid and the Constitution, 54 N.Y.U. L. Rev. 120 (1979).

Further, the failure to obtain an abortion may result in the denial of other medical treatment which would be covered by Medicaid, but which requires the abortion as a condition precedent for that treatment.

The encouragement of "normal childbirth" at the expense of damage to the mother's health, and the consequent increase of maternal mortality is not a legitimate State interest. Zbaraz v. Quern, 469 F. Supp. 1212 at 1219-20 (N.D. Ill. 1979). McRae v. Secretary H.E.W., 76 C 1804 (U.S.D. Ct. Ed. N.Y. 1980). Women's Health Services, Inc. v. Maher, Civ. No. H-79-40 (D. Conn. January 7, 1980) p. 23. Reproductive Health Services v. Freeman, Docket No. 79-1346 (Ct. 8, 1980) pp. 25-9.

C. EFFECTS

In choosing to fund abortions in only a few, very narrowly defined instances, the Congress has chosen to exclude the majority of health problems, where a physician, using his best medical judgment, would determine an abortion is necessary.

Uniformly, the Courts have found that the Hyde standards exclude the greater part of cases in which doctors would recommend abortion as a medically necessary procedure to safeguard the woman's health. McRae v. Secretary of H.E.W., supra, pp. 110-1, 308. Zbaraz v. Quern, supra, pp. 1219-20. Right to Choose v. Byrne, 169 N.J. Super 443, 547 (Ch. 1979). Planned Parenthood v. Rhodes 477 F. Supp. 529, 553 (E.D. Ohio 1979).

For example, in Women's Health Services, Inc. v. Maher, the Court at p. 12-13 notes:

> Among the conditions that may make an abortion medically necessary are all auto-immune diseases (rheumatic arthritis, multiple sclerosis, lupus, etc.); chronic heart, liver, and kidney diseases; chronic anemia; diabetes; phlebitis, toxemia (high blood pressure coupled with fluid retention, progressing to convulsions and sometimes death, particularly among young persons); hypertension; severe stress; schizophrenia; biological depression; and dependence on psychoactive and other medication. The Department of Health, Education and Welfare has compiled a thorough, though not exhaustive, list of 21 conditions that may indicate, under certain circumstances, the medical necessity for an abortion. In some cases, a mother's knowledge of likely fetal deformity, retardation, mortality, or morbidity generates such anxiety that an abortion becomes a medical necessity to preserve the mother's psychological health. Pregnancies in women suffering from any of these conditions cannot be termed "normal" pregnancies, nor can childbirth in such women be termed "normal" either.

And see McRae v. Secretary of H.E.W. at p. 99-113 for a thorough discussion of same.

A greater proportion of poor women have,

or develop during pregnancy, certain medical problems than those affecting the female population generally. The proportion of these women medically requiring an abortion is two to three times greater than the general population, and their maternal mortality rate is higher. Thus Hyde denies Medicaid to precisely those women who, as a medical matter, need it most. McRae v. Secretary of H.E.W., supra, pp. 101-3, 123, 309. Women's Health Services, Inc. v. Maher, supra, pp. 13-15.

Clearly, the effect of Hyde has been to severely restrict access to abortions.

In 1977, prior to the restrictions of Medicaid statutes, 67% of Medicaid women in need of abortions obtained them. Following the N.J. version of Hyde, limiting abortions to save the life of the mother, only 98 abortions were obtained in a ten and a half month period. Alan Guttmacher Institute, Abortion: Need Services v. Policies: N.J. (1980).

In McRae v. Secretary of H.E.W. at p. 293 Judge Dooling found the effect of Hyde was to reduce medically funded abortions by 95% nationally.

Finally, between the lifting of an injunction (of N.J. Statute permitting abortions only to preserve the life of the mother), and the revised order of the State Department of Health promulgated pursuant to a hearing of the Court (see below), births to Medicaid recipients went up 30% and Medicaid abortions dropped from 900 to 25 per month. The incontrovertible effect of the statute has been to block Medicaid

women from necessary abortions. Right to Choose v. Byrne, 165 N.J. Super 443, 457 (Ch. 1979).

In Maher, Mr. Justice Powell stated in discussing the cut-off of funds for elective abortions:

> Regulation places no obstacles--absolute or otherwise--in the pregnant woman's path to abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.

432 U.S. 474.

Contrary to this assumption, the withdrawal of public health service in this field does not genuinely leave the indigent woman any safe medical alternative.

> There is no evidence...and it can not be found and it is not found as a fact that Medicaid-eligible women have been able to obtain legally induced abortions through any use of their necessarily "exiguous personal funds," or at free public hospitals, or through philanthropic assistance, or reduced clinical charges.

McRae v. Secretary of H.E.W., supra, pp. 74-5.

Philanthropic or charitable institutions

are not a resource for indigent women seeking abortions. As the Circuit Court found in Eastern Kentucky Welfare Rights Organization v. Simon, 506 F. 2d 1278 (D.C. Cir. 1974) vac. and remanded for dismissal o.g. 426 U.S. 26 (1976):

> Philanthropy accounts for only a minute percentage of the hospital's total operating costs. The institution of Medicare and Medicaid in the last decade combined with the rapid growth of medical and hospital insurance has greatly reduced the number of poor people requiring free or below cost hospital services.

(p. 1288). See also Blendon, National Health Insurance: What Will Be the Impact on Private Philanthropy, Vol. 16, No. 2 Foundation News, 1975 and Blendon, Changing Role of Private Philanthropy in Health Affairs, 292 N.E. Journal of Medicine, pp. 946-50 May 1975, and McRae v. Secretary of H.E.W., p. 77.

Finally, even if somehow money or services became available, the delay in obtaining abortions is harmful. Time is critical. Risks during the first trimester are admittedly lower than during the later months. Doe v. Wade, 410 U.S. 179, 198 (1973), Women's Health Services v. Maher, supra, at p. 14, McRae v. Secretary of H.E.W., supra, 62-72, 113-116, Right to Choose v. Byrne, 169 N.J. Super at p. 547. Further, using the Hyde standards would result in failing to abort until the medical problem emerges as a crisis later because it could not be predicted earlier.

At this later stage, the risk of mortality would be "unacceptably high, resulting in a significant number of deaths." See McRae v. Secretary of H.E.W., supra, pp. 92-99 and Zbaraz v. Quern, supra, at pp. 1919-20.

The medical witnesses who testified on the health consequences that would follow if "Hyde" was made the standard for funding abortions were in agreement that it would cause an increase of abortions performed by unqualified persons and self-induced abortion, with a resulting increase in maternal mortality and post-abortion complications. McRae v. Secretary of H.E.W., supra, at pp. 67-9. In accord is Zbaraz finding the effect of Hyde is to increase substantially maternal mortality among the indigent, at p. 1220.

The availability of adequate abortion facilities is directly related to the rate of maternal deaths due to abortions. See McRae v. Secretary H.E.W., at pp. 61-67.

To exclude women from obtaining abortions which are considered to be medically necessary is an irrational act. To prefer the fetus to the woman's health acts to jeopardize her interests for the sake of potential life. Surely this is without support in any of this Court's previous decisions and cannot be seriously accepted as a legitimate mode of protecting its interest in childbirth in light of the serious negative effect upon the mother.

CONCLUSION

The Amici HSAs are charged with the responsibility of providing effective health care for those who need it. Particularly, they seek to ensure that all medically necessary services are covered. Amicus Essex County Executive seeks to protect the right of indigent county residents to receive funding for all medically necessary procedures. In light of the factual findings of this case, and others, it is clear that many indigent women will be without abortions that are medically necessary. Without Medicaid, the facilities and money necessary to procure them will be unavailable. Indeed, at this time, facilities are concentrated in urban areas which do not provide for many of those in our state. Statistics show approximately 25% of N.J. residents obtain abortions out of the state. Alan Guttmacher Institute, supra, at pp. 2, 14. This accounts for the finding in that study that in order to improve accessibility of services to the poor, public funding must be made available.

The resulting harm from the denial of these funds include the real possibility of the substantial increase of maternal deaths and greater health risks to pregnant women. These are results we do not want to see. The harm to the health of our population is a real concern.

In light of all the health concerns to the mother, and to our communities, and the irrationality of the federal government's actions, we urge that public funding for necessary abortions be available throughout the State.

Respectfully submitted,

RANDALL W. WESTREICH
90 Culberson Road
Basking Ridge, N.J.

NADINE TAUB
15 Washington Street
Newark, N.J.

Attorneys for Bergen-Passaic Health Systems Agency, Hudson Health Systems Agency, and Southern New Jersey Health Systems Agency

DAVID BEN ASHER
Hall of Records
Newark, N.J.

Attorney for Essex County Executive, Peter Shapiro

March 13, 1980

MOTION FILED
MAR 19 1980

No. 79-1268

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

PATRICIA R. HARRIS,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant,

v.

CORA MCRAE, et al.,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

WILFRED R. CARON
General Counsel

PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
202/659-6690

Of Counsel:

GEORGE E. REED

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant,

v.

CORA MCRAE, et al.,
Appellees.

MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in this case.

IDENTIFICATION AND INTEREST OF THE AMICUS

I.

Identification of the Amicus

The United States Catholic Conference is a non-profit corporation and an agency through which the Catholic Bishops of the United States collaborate with other members of the Church—priests, religious and laity—in areas where voluntary collective action on an

interdiocesan and national basis can benefit the Church and society.

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

II.

Interest of the Amicus in This Case

This case affects matters fundamental to our society. It is the conviction of this *amicus* that the Court can only be well served in matters of such wide import when it has assistance from all quarters. Thus, it is a spirit of service which prompts this *amicus* to make this submission.

WILFRED R. CARON
General Counsel

PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
202/659-6690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS,
SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant,

v.

CORA MCRAE, et al.,
Appellees.

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

ARGUMENT

It is the view of this *amicus* that the questions presented in this case are controlled by this Court's decision in *Maher* v. *Roe,* 432 U.S. 464 (1977) and *Poelker* v. *Doe,* 432 U.S. 519 (1977). In *Maher* the Court noted:

> [T]he right [created by Roe v. Wade] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

432 U.S. 464, 473-74.

Law does more than simply regulate; law articulates the values to which we, as a society, subscribe. The values so articulated vary widely. Not all legislative judgments reach the deepest fibers of our social life. However, questions which meet the fundamental problems of human existence insinuate themselves in the most sublime fashion into all realms of human activity. The question of the value of human life is one such question.

Abortion, and its relation to the value of human life, raises profound moral problems, as has been recognized by this court in the Abortion Cases.[1] Those cases did not, and indeed, could not alter the moral character of the practice of abortion. Despite the legal effort of the Abortion Cases, Americans may nevertheless act on their conviction that abortion is immoral by denying financial support to the practice. Americans and their legal representatives still remain free to consider that the practice of abortion is immoral.

This Court has repeatedly found that legislatures have constitutional authority to act in furtherance of public morality. The Court noted in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973):

> In deciding *Roth,* this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect the '*social interest in order and morality.*' Roth v. United States, 354 U.S. at 485, 77 S. Ct., at 1309, quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1031 (1952). (Emphasis in Roth.)

Id. at 61.

[1] *Roe* v. *Wade,* 410 U.S. 113 (1973); *Doe* v. *Bolton,* 410 U.S. 179 (1973).

Focusing on the abortion issue specifically, this Court stated in *Maher, supra,* that legislatures are free to take measures which reflect a life-affirming value:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.

432 U.S. at 475.

The decisions in the Abortion Cases[2] created an immunity from state interferences with the practice of abortion. They did not create an entitlement to benefits. *Maher* v. *Roe, supra,* at 476. The transformation of immunity into entitlement to draw upon the resources of the public treasury necessarily implies a social commitment to the affirmative value of such expenditures and necessarily requires a legislative expression of such commitment. *Poelker* v. *Doe, supra.*

As this Court noted in *Buckley* v. *Valeo,* 424 U.S. 1, 17 (1976), the expenditure of money is related to speech. It is clear, then, that funding is an expression of an affirmative social value. The "Hyde Amendment" is a limitation on the expenditure of public funds and exists because the commitment of those funds is inextricably bound up with the expression of public morality. The practice of abortion is perceived as morally abhorrent and the great public resistance to the expression of support for this practice is rooted in this perception.

As a nation we are faced with the question of the public funding of an act morally and socially objectionable to large segments of our society. Decisions of this

[2] *See* note 1, *supra.*

sort are historically considered matters for the legislative branch of government, not the judiciary. *Missouri, Kansas & Texas R. Co.* v. *May,* 194 U.S. 267, 270 (1904). At issue here is the vital interest of the body politic in the democratic process itself. Whether that interest is rooted explicitly in the Ninth amendment or is deemed as a more fundamental, implicit constitutional premise, it is imperative in a constitutional democracy such as ours that deference be given the people's right to shape their common values and institutions.

CONCLUSION

Because we believe that the issues presented herein have been settled by the cases of *Maher* v. *Roe* and *Doe* v. *Poelker,* we believe that the instant decision should be reversed.

Respectfully submitted,

WILFRED R. CARON
General Counsel

PATRICK F. GEARY
Assistant General Counsel

Attorneys for
United States Catholic Conference
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
202/659-6690

Of Counsel:

GEORGE E. REED

Supreme Court, U.S.
FILED
MAR 19 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1268

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Petitioners,

v.

CORA McRAE, et al.,

Respondents.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.

SANFORD JAY ROSEN
KATHLEEN J. PURCELL
ROSEN, REMCHO & HENDERSON
155 Montgomery Street
Suite 1502
San Francisco, CA 94104
(415) 433-6830

Attorneys for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1268

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Petitioners,

v.

CORA McRAE, et al.,

Respondents.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
The Interest of the Amicus	1
Introduction	6
Argument	
I. The Hyde Amendment Violates the Free Exercise Clause of the First Amendment	10
II. The Establishment of Religion Issues Need Not and Should Not Be Addressed in this Case	14
III. The Hyde Amendment Denies Poor Women their Rights to Equal Protection and Due Process	15
A. Strict Scrutiny Analysis Governs the Constitutional Evaluation of the Hyde Amendment	17
1. The Hyde Amendment Burdens the Exercise of Fundamental Rights	18
2. The Hyde Amendment Discriminates Against a Suspect Class	23
B. The Hyde Amendment Cannot Withstand Any Form of Constitutional Scrutiny	28
Conclusion	30

TABLE OF CASES

Page(s)

Beal v. Doe,
432 U.S. 438 (1977).....19

Christian Echoes National
Ministry v. United States,
414 U.S. 864 (1973) 10

Colautti v. Franklin,
439 U.S. 379, 386 (1979).....19

Doe v. Bolton,
410 U.S. 179 (1973).....1, 2

Dunn v. Blumstein,
405 U.S. 330 (1972).....17

Edward v. California,
314 U.S. 160, 184-85 (1941)
(Jackson, J. concurring).....24

Everson v. Board of Education,
330 U.S. 1, 16 (1947).....12

Griswold v. Connecticut,
381 U.S. 479, 514 (1965).....2, 18

Hannegan v. Esquire, Inc.,
327 U.S. 146, 156 (1946).....22

Harper v. Virginia Board of
Elections, 383 U.S. 663,
668 (1966).....23

Maher v. Roe,
432 U.S. 464, 472, n. 7
(1977).....11, 19, 20
28

Page(s)

Marbury v. Madison,
1 Cranch 137, 178,
2 L.Ed. 60, 73 (1803).....30

McDaniel v. Paty,
435 U.S. 618 (1978).....10

McDonald v. Board of
Elections, 394 U.S. 802,
807 (1969).....23

Memorial Hospital v. Maricopa
County, 415 U.S. 250, 259
(1974).....21, 22

Negre v. Larsen,
401 U.S. 437 (1970).....10

Poelker v. Doe,
432 U.S. 519 (1977).....19

Roe v. Wade,
410 U.S. 113, 152-53, (1973).....passim

San Antonio School District
v. Rodriquez, 411 U.S. 1,
22-23 (1973).....24, 27

Shapiro v. Thompson,
394 U.S. 618, 638 (1969).....21, 28

Sherbert v. Verner,
374 U.S. 398, 403-404 (1963).....11, 12, 13
21

Speiser v. Randall,
357 U.S. 513, 518 (1958).....22

Stanley v. Georgia,
394 U.S. 557, 564 (1969).....18

United States v. Carolene
Products Co., 304 U.S.
144 (1938).....23

Page(s)

Walz v. Tax Commission,
397 U.S. 664 (1970).....10

Whalen v. Roe,
429 U.S. 589, 559-600 (1977).....18

Wisconsin v. Yoder,
406 U.S. 205, (1971).....10, 13

Wyman v. James,
400 U.S. 309 (1971).....13

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....13

Statutes

42 U.S.C. § 1396.....24

42 U.S.C. § 1396(a).....25

Miscellaneous

Anatole France,
Crainquebille.....26

J. Handler and E. Hollingsworth,
Stigma, Privacy and Other
Attitudes of Welfare Recipients,
22 Stan.L.Rev. 1, 2 (Nov.
1969).....18

THE INTEREST OF THE AMICUS[1/]

The National Council of Churches in the U.S.A. is the cooperative agency of thirty-two national religious denominations with an aggregate membership of over 40,000,000 in the United States. These several bodies are sharply divided in their views on the moral significance of abortion, notwithstanding which their representatives on the Governing Board of the National Council in 1977 adopted a resolution which stated:

> Whereas the National Council of Churches in 1963 unanimously adopted a Policy Statement on Human Rights which asserts in part, "Among the rights that are due to all persons without discrimination as to creed, race, color, sex, birth, nationality or economic status" is the political and civil right "to receive such benefits of social welfare, health, community or other services as are provided by governments at all levels;" and
>
> Whereas the Supreme Court of the United States in its 1973 decision Roe v. Wade and Doe v. Bolton guaranteed the legal right of women to obtain an abortion; and. . .
>
> Whereas legislation in Congress in effect denies that legal right to poor women by restricting public

---

[1/] The attorneys for all parties have consented to the filing of this brief by amicus curiae. The letters requesting this consent will be forwarded to the Court immediately upon receipt by amicus.

funding for abortion [the "Hyde Amendments"];

Therefore, be it resolved that the National Council of Churches' Governing Board, even though it has no policy on abortion as such:

- reaffirms its support of the principle that a right guaranteed to all by law must not be denied to any because of economic status;

- urges the President, Congress and state legislatures to guarantee equal access to legal rights, including legal abortions, by ensuring adequate public funding. . . .

In the Same Policy Statement on HUMAN RIGHTS referred to in the resolution, the National Council of Churches had expressed its support for every person's right "to enjoy privacy," a right asserted two years before Griswold v. Connecticut, 381 U.S. 479 (1965), and ten years before Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410, U.S. 179 (1973).

The National Council of Churches has repeatedly enunciated its recognition of the high importance of religious liberty and of the right and duty of every person to obey the dictates of conscience.

> This social judgment accords with our Christian belief that conscience is the light given by God to every man to seek good and reject evil. In instances of conflict with human authorities, Christians have insisted, "We must obey God rather than man" (Acts 5:29). The Church, when it has been true to this insight, has nurtured and defended the right and duty of all men to obey God as each perceived His will in the leading of conscience.
>
> However, "conscience" is not a monopoly of Christians or of the religious traditions. Neither is there one kind of conscience that is "religious" and another that is "non-religious," but only the human conscience, which Christians see as God's gift, whether or not every individual so understands it.
>
> Policy Statement on Conscientious Objection to Military Service (February 23, 1967)

The National Council of Churches has also maintained since its inception in 1950, as did its predecessor, the Federal Council of Churches since 1908, the right and responsibility of churches (and of other religious -- and non-religious -- bodies) to speak out on issues of public policy and to attempt to effectuate through the democratic process what they believe to be the right moral and ethical course for society.

In a Policy Statement adopted

February 25, 1959, the National Council addressed the Christian Churches of the United States of America as follows:

> . . . Every organization must, on occasion, confront issues which test its purposes and try its values. Such an issue has now arisen. . . .
>
> It arises in the form of a series of challenges to a basic tenet of the National Council of Churches, stated most recently by the Church Board at its meeting of December 3-4, 1958. This concerns the right and duty of the Christian Churches and their Councils "to study and comment upon issues, no matter how controversial, in the realm of politics, economics and social affairs, in view of their common faith in Jesus Christ as both Lord and Savior. . . ."
>
> The issue is the right of the citizen of whatever race or creed, and of any peaceable organization he choose to form or join, to discuss freely and to express judgments, without exposure to attacks upon motive or integrity for daring to exercise the right to to so. Such a right is especially vital to the Church, which owes a duty to lead and to inform, so that its members may be aided in reaching morally valid judgments in the light of their common faith.
>
> . . . The right of free discussion becomes ever more essential, not as

> a private privilege but as a public necessity, and attacks upon it must be vigilantly resisted.
>
> NOW, THEREFORE, The General Board of the National Council of the Churches of Christ in the U.S.A. addresses this APPEAL to all of its constituent churches, related councils and organizations:
>
> 1. UPHOLD the right and duty of the churches and their councils to study and comment upon issues of human concern, however controversial. . . .
>
> --THE HARTFORD APPEAL, February 25, 1959

Its very constitution lists as one of the purposes of the National Council of Churches:

> 8. To study and to speak and act on conditions and issues in the nation and the world which involve moral, ethical and spiritual principles inherent in the Christian Gospel.

For all these reasons, the National Council of Churches submits this brief as a friend of the Court to urge affirmance of the order and opinion of the Court below.

INTRODUCTION

Since 1976, Congress has passed a series of enactments (referred to collectively herein as the "Hyde Amendment") limiting the use of Medicaid funds to pay for abortions. The precise terms of the Hyde Amendment have varied with each enactment. However, as demonstrated by the medical testimony reviewed in the district court's opinion and that court's unassailable findings, the net effect of the legislation has been to deny indigent women Medicaid funds to pay for therapeutic, medically necessary abortions except in those cases in which the life of the mother is imminently threatened.

At its broadest, the Hyde Amendment has permitted Medicaid benefits for abortions in three circumstances: (1) where the mother's life is endangered; (2) where the mother will suffer severe and long-lasting physical health damage; and (3) where the pregnancy is the result of rape or incest if it is promptly reported as such. Yet as the district court's findings of fact make plain, when superimposed upon the realities of medical practice and pregnancy, these criteria reduce to Medicaid benefits being available only for "crisis intervention" abortions (District Court Typewritten Opinion, hereinafter "Op.," at 110).

The life endangerment standard is medically meaningless (Op. at 91-99). There are a multitude of conditions which make termination of pregnancy medically advisable and which theoretically could be considered life

endangering but which the medical witnesses, nonetheless, did not feel they could certify as meeting the statutory standard. (Op. 96-97.) Furthermore, the delay required for protracted observation until professionally certifiable necessity is demonstrable itself creates an added threat to the health of the mother. (Op. 65-66, 113-16.)

The exception in the Hyde Amendment allowing Medicaid benefits for abortions when the mother is threatened with "severe and long-lasting physical health damage" also is medically meaningless. The district court found there was no class of definable instances in which this criterion would apply and that, when combined, with the requirement of certification of the condition by two physicians, it "would result in reducing certification to. . . the 'classic' life threatening conditions." (Op. at 100.)

Finally, the reporting requirements that accompany the rape and incest exception to the Hyde Amendment's prohibition "exclude a large part of rape victims from Medicaid coverage." (Op. at 151.)

In short, the Hyde Amendment effectively denies therapeutic abortions to indigent women except in the most extreme circumstances in which a demonstrable threat to the mother's life exists. Further, application of the criteria for Medicaid benefits to cover abortions will inevitably be arbitrary and equitable. As found by the district court:

> The teaching of the testimony as a whole, not excluding the testimony of the physicians presented as witnesses by the guardian, was that the Hyde-Conte Amendment could not be equal and uniform in interpretation and application, but that medical judgments under the amendment would necessarily reflect individual professional evaluations of conditions of inherently uncertain prognosis, that could occur in very different degrees of severity and with radically different degrees of access to supportive care, and could become manifest at widely different gestational ages and physiological, psychological, and social circumstances. More particularly significant was the very substantial risk that professional reluctance to certify under a standard alien to medical experience and terminology would deny medical assistance to women in instances in which it would not have been withheld under the older abortion committee standards.
>
> (Op. at 99-100.)

On the basis of the extensive record below, the district court found that the Hyde Amendment bore no rational relationship whatsoever to any legitimate governmental interest and constituted an impermissable and discriminatory violation of a woman's fundamental right to make a "conscientious decision, in consultation with her

physician, to terminate her pregnancy because that is medically necessary for her health." (Op. at 328.)

Amicus wholeheartedly endorse the result that the district court reached in this case. Amicus does not address herein all of the bases for the court's detetmination. Rather, amicus submit for this Court's particular consideration two issues evoked by the trial court's determination which amicus believes are uniquely presented by the facts of this case and which should be decided by this Court. Amicus submits (1) that the Hyde Amendment should be evaluated according to a standard of strict judicial scrutiny, and (2) that the Establishment Clause of the First Amendment is not implicated in this case.

ARGUMENT

I.

THE HYDE AMENDMENT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

Amicus National Council of Churches has been at pains to assert the importance of the free exercise of religion in numerous cases before this Court, including Negre v. Larsen, 401 U.S. 437 (1970), Walz v. Tax Commission, 397 U.S. 664 (1969), Christian Exhoes National Ministry v. United States, 414 U.S. 864 (1973) Wisconsin v. Yoder, 406 U.S. 205 (1971) McDaniel v. Paty, 435 U.S. 618 (1978), and others. Of all the rights safeguarded by the Bill of Rights, there is none more important than those which stand first in the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

If those words have any fundamental meaning, it is that government will not place obstacles in the way of its citizens' efforts to follow the dictates of conscience and religious obligation unless the most compelling of interests require it and can be subserved in no other way. In the view of amicus National Council of Churches, there are few interests of the State sufficiently compelling to justify the overriding of its citizens' conscientious scruples.

The subject of abortion is one which assumes a life-and-death

importance for many people, and among them are found views that are not only vehement but diametrically opposed. Religious teachings of profound depth and intensity on both sides of the issues are found in the "mainstream of the country's religious beliefs," as the court below concluded from the extensive testimony before it, and as amicus National Council of Churches can attest from the opposing views within its own membership. In a civil society where both views are broadly represented, the law should mandate neither the one nor the other, but should steer as nearly neutral a course between them as other important rights and interests make possible.

The fact that women have been held by this Court to have a right to obtain an abortion, at least during the first two trimesters of pregnancy (Roe v. Wade, 410 U.S. 113 (1973)), does not, of course, oblige society to fund the exercise of that right (Maher v. Roe, 432 U.S. 464 (1977)). But when society has erected a system of publicly-funded health-care for poor persons, pregnant women otherwise entitled to such health-care cannot constitutionally be denied access to a particular standard medical procedure when it is not only medical y advised to be necessary to the woman's health, but conscientiously chosen and sought.

In Sherbert v. Verner, 374 U.S. 398 (1963), this Court found that a woman could not be denied unemployment compensation because--for religious reasons--she refused jobs that would require her to work on her Sabbath. The Court so

ruled on the ground that such a policy would require her to choose between her religious scruples and public benefits to which she would otherwise be entitled. Sherbert v. Verner, supra, 374 U.S. at 404-406. The Court so held in reaffirmance of a principle enunciated fifteen years earlier, that the State may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation." Sherbert v. Verner, supra, 374 U.S. at 410, quoting from Everson v. Board of Education, 330 U.S. 1, 16 (1947) (emphasis in original).

The statutes at issue in Sherbert v. Verner, like the Hyde Amendment here, made no mention of any faith-groups by name. "Seventh-day Adventists" were not excluded from unemployment compensation, nor "Roman Catholics" from reimbursement for bus transportation. It was not their religious belief or their nominal adherence to a statutorily disadvantaged sect (which would, of course have been unconstitutional on the face of it), but the practice of their religion that effectively excluded them from public benefits for which their fellow-citizens qualified. Similarly, in this case, the practice of not only medically necessary but conscientiously implemented religious convictions would deprive pregnant poor women of benefits to which they would otherwise be entitled under a statute that appears religiously neutral on its face.

The courts have no higher duty than to determine when statutes seemingly neutral on their fact actually operate to disadvantage the free exercise of religion and then to remedy that disadvantage. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The typical remedy for a claim of denial of free exercise of religion would be to exempt qualifying claimants from a law of general application (Sherbert v. Verner, supra, Wisconsin v. Yoder, supra), but because the court below struck down the discriminatory amendments on equal protection grounds as well, such an individualized remedy, with its difficult and sensitive test of sincerity, is avoided.

Thus amicus National Council of Churches supports the contention of appellees and the ruling of the trial court that the "Hyde Amendment" must be found to violate the "free exercise" clause of the First Amendment.

II.

THE ESTABLISHMENT OF RELIGION ISSUES NEED NOT AND SHOULD NOT BE ADDRESSED IN THIS CASE

Because the religious establishment clause issues raised in this case are unusually complex and because there are other and more obvious grounds on which the Hyde Amendment must be invalidated, amicus urgesthis Court to avoid the establishment issues altogether.

In any event, amicus applauds the district court's reaffirmation of the right of religious groups to participate fully in the political process and its reminder that "the healthy working of our political order cannot safely forego the political action of the churches, or discourage it." (Op. at 326.)

III.

THE HYDE AMENDMENT DENIES POOR WOMEN THEIR RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

The Hyde Amendment effectively denies poor women who are eligible for Medicaid access to medically necessary abortions. The Amendment runs counter to our every concept of due process and equal protection. It operates to deny those individuals in our society who enjoy the least privacy -- the poor -- their fundamental right to privacy in making critical decisions of conscience concerning their health and their family.1/

1/ The liberty of conscience propounded herein, although often a component of religious belief, does not in and of itself give rise to the argument that the Hyde Amendment impedes the free exercise of religion guaranteed by the First Amendment to our Constitution. This Court has held that the pregnant woman's uninhibited decision on the issue of abortion during the early stages of pregnancy is within her constitutionally protected right to privacy, without reference to whether her religious beliefs are implicated. Roe v. Wade, 410 U.S. 113 (1973). Therefore, it is not necessary to address the question of free exercise of religion in this case.

The Hyde Amendment is further repugnant to the Constitution because it impedes the exercise of fundamental rights by and discriminates against a discrete, easily identifiable and traditionally disenfranchised segment of the population -- the poor, those whose indigency has forced them to and made them eligible for Medicaid. At the outset, the Amendment operates to the detriment of the poor as a discrete group because funds are withheld from them for elective abortions. More importantly, however, because poverty is a significant medical factor in the determination whether termination of pregnancy is a necessary and desirable health decision, the Hyde Amendment operates as an affirmative health burden which is imposed on the poor and only on the poor. And this burden attaches to the constitutionally protected decision whether to terminate pregnancy and not to any other health decision.

Because the Hyde Amendment burdens the exercise of fundamental rights of privacy and because its burden is imposed upon a suspect class, in order to sustain the Hyde Amendment the government must demonstrate that a compelling interest justifies the legislation and that it constitutes the least restrictive means of achieving such an interest. The government has not met that burden in this case. Indeed, as is evident from the record, Congress' express purpose to limit abortions by enacting the Hyde Amendment bears no rational relationship to this special burden imposed on the poor, and constitutes an unlawful attempt to legislatively override this Court's decision in

Roe v. Wade, 410 U.S. 113 (1973). Whatever legitimate fiscal and social considerations might be hypothesized for so limiting Medicaid benefits fail to justify the means employed by the Hyde Amendment. Ironically, any such considerations actually support a policy of Medicaid reimbursement for all therapeutic abortions.

In short, under any analysis, the Hyde Amendment constitutes a violation of the guarantees of Due Process and Equal Protection which lie at the core of our constitutional structure.

A. Strict Scrutiny Analysis Governs the Constitutional Evaluation of the Hyde Amendment.

As has been reiterated many times by this Court, whenever legislation burdens the exercise of a fundamental right or discriminates against a suspect class, the government carries a "heavy burden of justification" to demonstrate that the legislation is narrowly tailored to serve compelling government interests. See Dunn v. Blumstein, 405 U.S. 330 (1972) and cases collected therein. In this case, the challenged legislation both impinges on fundamental interests and discriminates against a suspect class. The confluence of these two constitutional invasions compels assessment pursuant to the strict scrutiny standard.

1. The Hyde Amendment Burdens the Exercise of Fundamental Rights.

Deeply enbedded in our national tradition is the fundamental constitutional interest in "making certain kinds of important decisions" free from governmental compulsion. Whalen v. Roe, 429 U.S. 589, 599-600 (1977). This theme emerges time and again in our literature, in the writings for example, of James Fennimore Cooper, Emerson, Thoreau, and Mark Twain, and in our legal heritage. The freedom "to be let alone" in making certain decisions is expressly guaranteed in the First Amendment to the Constitution (see Section I, supra), and emanates from the guarantees of the First, Fourth, Ninth and Fourteenth Amendments as a "penumbra, where privacy is protected from governmental intrusion." Griswold v. Connecticut, 381 U.S. 479, 514 (1965); Roe v. Wade, 410 U.S. 113, 152-53 (1973). See also, Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.")

In this case, the Court confronts the right to privacy as it pertains to the indigent poor, that group in our society which probably enjoys the least privacy. See, Wyman v. James, 400 U.S. 309 (1971); J. Handler and E. Hollingsworth, Stigma, Privacy and Other Attitudes of Welfare Recipients, 22 Stan.L.Rev. 1, 2 (Nov. 1969) ("Disclosing assets and

resources, revealing the names of one's friends and associates, submitting to investigations and questionings, accounting for expenditures and social behavior -- these are the price of receiving welfare.")

The significance of the right to privacy in the abortion context was settled by this Court in Roe v. Wade, 410 U.S. 113 (1973), where it concluded that the right to privacy, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, supra, 410 U.S. at 153, Colautti v. Franklin, 439 U.S. 379, 386 (1979). In Maher v. Roe, 432 U.S. 464 (1977), the Court reaffirmed "the fundamental right recognized in Roe," (432 U.S. at 474), but found that the limitations of funding of non-therapeutic abortions at issue there did not impermissibly impinge on the exercise of this fundamental right to choose an abortion.

The legislation at issue here, unlike the regulation at issue in Maher denies Medicaid funding for therapeutic or "medically necessary" abortions.2/

2/ Maher and its companion cases, Beal v. Doe, 432 U.S. 438 (1977) and Poelker v. Doe, 432 U.S. 519 (1977), all involved non-therapeutic abortions and turned on the state's interest in "normal childbirth." This case, in contrast, involves therapeutic abortions in situations where "normal childbirth" is unlikely if not impossible.

It thus impinges on one of a woman's most personal and precious privacy interests, maintenance of her own health and life. The effect of the Hyde Amendment thus is affirmatively to penalize poor women medically in need of abortions who wish to attempt to exercise their constitutionally protected right to terminate a health-threatening pregnancy rather than their constitutionally protected interest in carrying the fetus to term.3/ The sole determinant for the withholding of Medicaid funds is the decision to abort, a constitutionally protected choice. The consequences of this decision on the indigent woman in need of a therapeutic abortion and on her family, as documented in the district court's findings, are immediate and severe. If she chooses to carry the fetus to term, she risks serious, sometimes permanent physical debilitation (Op. at 105-10); she often is faced with psychological stress, imbalance and disorder -- perhaps to the point of chronic psychological disability (Op. at 111-13, 116-23); she hazards her continuing ability to perform within society and within the family as a wage earner, a homemaker, a mother, a wife; and, even assuming "normal childbirth," she faces all those

3/ Maher v. Roe, 432 U.S. 464, 472 n.7: "A woman has at least an equal right to choose to carry her fetus to term as to choose to abort it."

difficulties confronting an indigent family with an additional child, difficulties which may have forced the mother to seek an abortion in the first place.4/ On the other hand, if she chooses to seek an illegal abortion within her limited financial means, she plays Russian Roulette with her health and her life. (Op. at 74-75; Roe v. Wade, supra, 410 U.S. at 148-49.)

The individual's interest in medical care as a "basic necessity of life" already has been recognized by this Court. Memorial Hospital v. Maricopa County, 415 U.S. 250, 259 (1974). "And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater significance than less essential forms of governmental entitlements." Ibid. When the denial of government funds for necessities such as medical care and welfare bears a close relationship to the exercise of an otherwise protected constitutional right, that denial constitutes an impermissible burden or penalty on the exercise of the constitutional right, absent a compelling government interest in the funding regulations. Memorial Hospital v. Maricopa County, supra, 415 U.S. at 256-59; Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Sherbert v. Verner,

4/ It cannot be assumed that this final contingency can be avoided by the practice of birth control. As found by the district court in its review of the evidence, abortion decisions sometimes arise precisely because birth control practices failed to prevent conception. (See e.g. Op. at 117, 118.)

374 U.S. 398, 403-404 (1963). Cf. Speiser v. Randall, 357 U.S. 513, 518 (1958) (Discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech.) Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (Second class mail rates may not be granted or withheld on the basis of whether certain economic or political views are disseminated.)

Here, the denial of Medicaid benefits for therapeutic abortions effectively prohibits indigent women from exercising their constitutional right to make critical decisions regarding their pregnancy and their health. In light of its harsh consequences, to label this withholding of funds as anything other than a penalty on the decision to abort in the therapeutic context would be disengenuous to the extreme -- especially since this Court has held that medical care "is a basic necessity of life." Memorial Hospital v. Maricopa County, supra, 415 U.S. at 259.

Because the Hyde Amendment operates to penalize the exercise of indigent women's decision whether to abort in the therapeutic context, the government carries a "heavy burden" of showing that the legislation is the least restrictive means of achieving compelling government interests. This burden has not been met.

2. The Hyde Amendment Discriminates Against a Suspect Class.

In United States v. Carolene Products Co., 304 U.S. 144 (1938), the Court, through Chief Justice Stone, first adverted to the criteria by which suspect classifications which trigger a stricter judicial scrutiny of government acts may be identified. The Court reserved the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Carolene Products, supra, 304 U.S. at 152-53, n.4.

Since Carolene Products, the doctrine of suspect classification and the strict scrutiny which accompanies it have become well established. Nor has this doctrine been limited to racial classifications. As stated by the Court in Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966), "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." (citation omitted). See also, McDonald v. Board of Elections, 394 U.S. 802, 807 (1969) ("[A] careful examination on our part [of voting restrictions] is especially warranted where lines are drawn on the basis of wealth or race, two factors which independently render a classification highly suspect and thereby demand a more

exacting judicial scrutiny") (citations omitted). An individual's status as an indigent simply does not provide a reason for denying him or her rights and privileges of United States citizenship, Edwards v. California, 314 U.S. 160, 184-85 (1941) (Jackson, J. concurring).

In San Antonio School District v. Rodriquez, 411 U.S. 1, 22-23 (1973), this Court propounded a two-step inquiry for determining whether strict scrutiny shall apply to alleged wealth classifications: first, does the government practice "operate to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level," and second has the "lack of personal resources...occasioned an absolute deprivation of the desired benefit." (411 U.S. at 22-23). In Rodriquez, the Court declined to engage in a strict scrutiny analysis of the Texas school financing system because neither of these elements was shown to be present. Both elements are evident in the case at bar.

The class of indigent individuals denied access to medically necessary abortions under the Hyde Amendment is easily identifiable. They are defined by the standards for Medicaid eligibility. See 42 U.S.C. § 1396a. Nor can there be any doubt that these individuals are indigent. The very purpose of the Medicaid program is "to furnish medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet

the costs of necessary medical services." 42 U.S.C. § 1396.

The impact of the Hyde Amendment in absolutely denying these poor individuals necessary medical assistance is equally apparent. The standards set forth in the Hyde Amendment are so vague and uncertain that the Amendment operates to deny Medicaid funding for abortions except in the most extreme circumstances in which the mother's life is demonstrably endangered. See pp. 6 to 7 , supra. Notably, the delay necessary in many cases for protracted observation before a doctor can certify danger to the mother's life itself creates an added threat to the health of the mother. 5/ Moreover, because of the vagueness of the criteria embodied in the Hyde Amendment, its application to permit and deny abortion funding inevitably will be arbitrary and capricious. (Op. at 99-100).

The Hyde Amendment has enacted an absolute prohibition of needed therapeutic abortions for poor people in the vast number of cases in which they are medically advisable. It effectively overrules this Court's decision in Roe v. Wade, but only as to a discrete class in our society --

---

5/ In Roe v. Wade, this Court held that the health of the mother is a compelling state interest justifying regulation of abortions during the second trimester. Surely it is no less compelling when asserted by the mother rather than by the State.

indigent women.

The discriminatory impact of the Hyde Amendment is enhanced by the fact that poverty is a plainly identifiable medical factor which makes pregnancy more threatening to the health of indigent women. 6/ The Hyde Amendment denies medically necessary abortions to the very group which needs them most -- poor women, whose health is most often and most seriously threatened by carrying a child to term -- and increases the health burden these women already suffer. It represents the abstract aloofness and insensitivity to reality caricatured by Anatole France:

> The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread -- the rich as well as the poor.
>
> Anatole France, Crainquebille

6/ The district court made extensive factual findings regarding the significance of poverty as a medical factor in the abortion decision (Op. at 101-110, 123-24), culminating in this statement:

> Poverty is itself, and persistently, a medically relevant factor; it takes its toll on pregnant women's general health and in the heightening of the health risks of pregnancy. (Op. at 160).

The injustice of the situation is even more appalling when one considers that these women are afforded Medicaid benefits for numerous medically necessary procedures including child birth and some abortions, but are denied benefits for the vast majority of clearly therapeutic and "medically necessary" abortions. 7/

There can be no question that under the Hyde Amendment, indigent women are "saddled with such disabilities,... or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriquez, supra, 411 U.S. at 28. The Hyde Amendment cannot withstand the close judicial scrutiny which this situation demands.

7/ The classification created by the Hyde Amendment may be defined alternatively as a distinction between (1) abortions where the mother's life is endangered and other medically necessary abortions; (2) abortions on the basis of rape or incest and therapeutic abortions; or (3) therapeutic abortions and other necessary medical procedures. Regardless of how the lines are drawn, however, the class against whom the Hyde Amendment discriminates is easily identifiable. It consists of indigent women medically in need of abortions.

B. The Hyde Amendment Cannot Withstand Any Form of Constitutional Scrutiny

The district court found that the Hyde Amendment could not be sustained even under the less demanding rational relationship test. (Op. at 316-23.) In reaching this conclusion, the court did not need to speculate as to the legislative purpose underlying the enactment. The impermissible attempt to override this Court's constitutional decision in Roe v. Wade, 410 U.S. 113 (1973) was apparent from the Congressional debates. As stated by the district court: "the dominant purpose inferable was to prevent exercise of the right to decide to terminate pregnancy, to prevent the funds of taxpayers who disapproved of abortion on moral grounds from being used to finance abortions that were abhorent to them." (Op. at 318.)

Nor is it possible to hypothesize any legitimate interest served by this legislation. Unlike Maher v. Roe, 432 U.S. 464 (1977) and its companion cases, there is no interest in "normal childbirth" implicated here.

This Court consistently has rejected fear of fraud as a justification in cases such as this for limiting government aid to the poor. See Shapiro v. Thompson, 394 U.S. 618, 637 (1969). Further, as the district court noted: "Fear of fraud on Medicaid, of feigned pschiatric problems, can hardly justify excluding a whole field of health damage from appropriate treatment." (Op. at 322.)

Finally, fiscal considerations -- which apparently played no part in the enactment of the Hyde Amendment -- weigh against the validity of the Amendment. Medicaid continues to pay for childbirth, so there is no financial saving overall. Further, to the extent the Hyde Amendment requirements inhibit medically necessary abortions, there will be more medical complications in pregnancy and childbirth among indigent women which, in turn, will increase the Medicaid bill. Even where an abortion ultimately is performed, the delay necessary for physicians to certify danger to the mother's life or severe and long-lasting physical injury virtually assure additional complications in the pregnancy and its termination which require greater Medicaid spending. The costs of caring for indigent women who, as a result of illegal abortions, suffer medical complications also, necessarily, are more expensive than a legal abortion.

In short, the Hyde Amendment is wholly irrational when measured against legitimate (and constitutional) government interests. It fails to survive constitutional scrutiny under the least demanding test, let alone under the strict judicial scrutiny which should apply in this case.

CONCLUSION

This Court long has been faithful to the "duty of the judicial department to say what the law is," regardless of legislative views to the contrary. Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60, 73 (1803). In this case, the legislature impermissibely has attempted to usurp this Court's constitutional authority and partially resolve the abortion debate in the context of an appropriations bill rather than in the constitutional forum. This illegitimate effort is especially tainted because it violates the Free Exercise clause of the First Amendment and denies the indigent -- a peculiarly needy and disadvantaged group -- their fundamental right to privacy in making decisions of conscience essential to their health, well-being and family. The district court did not err in finding the Hyde Amendment fatally unconstitutional.

Respectfully submitted,

SANFORD JAY ROSEN
KATHLEEN J. PURCELL
ROSEN, REMCHO &
HENDERSON

Attorneys for Amicus Curiae the National Council of Churches of Christ

Supreme Court, U.S.
FILED
MAR 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1268

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Petitioners,

v.

CORA McRAE, et al.,

Respondents.

On Appeal from the United States District Court for the Eastern District of New York

~~MOTION OF~~ THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF AMICUS CURIAE

SANFORD JAY ROSEN
KATHLEEN J. PURCELL
ROSEN, REMCHO & HENDERSON
155 Montgomery Street
Suite 1502
San Francisco, Ca. 94104
(415) 433-6830

Attorneys for Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1268

PATRICIA HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Petitioners,

v.

CORA McRAE, et al.,

Respondents.

On Appeal from the United States District Court for the Eastern District of New York

---

BRIEF OF THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A. AS AMICUS CURIAE

INTEREST OF AMICUS

The United Presbyterian Church in the U.S.A. is a religious denomination, organized in 1706 and consisting of some 8,600 churches in 152 presbyteries throughout the United States. William P. Thompson, Stated Clerk of the General Assembly, the supreme governing body, of the United Presbyterian Church in the U.S.A., is the executive officer of the General Assembly.

Through its General Assembly, this Church has established a policy affirming the right of individual moral choice in matters concerning abortion, supporting the availability of medical care to those women who choose to terminate their pregnancy, and specifically urging the restoration of public funding for medically safe abortion care.

INTRODUCTION

Since 1976, Congress has passed a series of enactments (referred to collectively herein as the "Hyde Amendment") limiting the use of Medicaid funds to pay for abortions. The precise terms of the Hyde Amendment have varied with each enactment. However, as demonstrated by the medical testimony reviewed in the district court's opinion and that court's unassailable findings, the net effect of the legislation has been to deny indigent women Medicaid funds to pay for therapeutic, medically necessary abortions except in those cases in which the life of the mother is imminently threatened.

(See typewritten District Court opinion, hereafter "Op.", at 91-100, 113-16, 151).

Further, because the criteria for Medicaid benefits to cover abortions are so appallingly vague, their application inevitably will be arbitrary and inequitable. (Op. at 99-100.)

On the basis of the extensive record below, the district court found that the Hyde Amendment bore no rational relationship whatsoever to any legitimate governmental interest and constituted an impermissible and discriminatory violation of a woman's fundamental right to make a "conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary for her health." (Op. at 328.)

Amicus United Presbyterian Church joins amicus National Council of Churches of Christ in the U.S.A. in endorsing the result reached by the district court in this case. Amicus, United Presbyterian Church also joins the arguments of amicus National Council of Churches as set forth below and in brief amicus curiae filed on behalf of the National Council of Churches.

ARGUMENT

I.

THE HYDE AMENDMENT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

Of all the rights safeguarded by the Bill of Rights, there is none more important than those which stand first

in the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

If those words have any fundamental meaning, it is that government will not place obstacles in the way of its citizens' efforts to follow the dictates of conscience and religious obligation unless the most compelling of interests require it and can be subserved in no other way. In the view of amicus United Presbyterian Church, there are few interests of the State sufficiently compelling to justify the overriding of its citizens' conscientious scruples.

This case involves the conscientious scruples and liberty of conscience of indigent women facing unwanted and health-threatening pregnancies. Although the Hyde Amendment does not overtly prohibit abortions in this context, the denial of Medicaid funding is closely related to the constitutionally protected decision and effectively precludes the implementation of decisions of conscience on the abortion question by poor women. Thus, in this case as in Sherbert v. Verner, 374 U.S. 398 (1963), the practice of religion effectively excludes these women from public benefits for which their fellow citizens are qualified. In Sherbert v. Verner, 374 U.S. at 404-406, that sort of legislatively created inhibition on religious practice was held impermissible.

The courts have no higher duty than to determine when statutes seemingly neutral on their face actually operate

to disadvantage the free exercise of religion and then to remedy that disadvantage. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The typical remedy for a claim of denial of free exercise of religion would be to exempt qualifying claimants from a law of general application (Sherbert v. Verner, supra, Wisconsin v. Yoder, 406 U.S. 205 (1971)), but because the court below struck down the discriminatory amendments on equal protection grounds as well, such an individualized remedy, with its difficult and sensitive test of sincerity, is avoided.

Thus amicus United Presbyterian Church supports the contention of appellees and the ruling of the trial court that the "Hyde Amendment" must be found to violate the "free exercise" clause of the First Amendment.

II.

THE ESTABLISHMENT OF RELIGION ISSUES NEED NOT AND SHOULD NOT BE ADDRESSED IN THIS CASE

Because the religious establishment clause issues raised in this case are unusually complex and because there are other and more obvious grounds on which the Hyde Amendment must be invalidated, amicus urges this Court to avoid the establishment issues altogether.

In any event, amicus applauds the district court's reaffirmation of the right of religious groups to participate fully in the political process and its reminder that "the healthy working of our political order cannot safely forego the political action of the churches, or discourage it." (Op. at 326.)

III.

THE HYDE AMENDMENT DENIES POOR WOMEN THEIR RIGHTS TO EQUAL PROTECTION AND DUE PROCESS

The Hyde Amendment effectively denies poor women who are eligible for Medicaid access to medically necessary abortions. The Amendment runs counter to our every concept of due process and equal protection. It operates to deny those individuals in our society who enjoy the least privacy -- the poor -- their fundamental right to privacy in making critical decisions of conscience concerning their health and their family.

The Hyde Amendment is further repugnant to the Constitution because it impedes the exercise of fundamental rights by and discriminates against a discrete, easily identifiable and traditionally disenfranchised segment of the population -- the poor, those whose indigency has forced them to and made them eligible for Medicaid. At the outset, the Amendment operates to the detriment of the poor as a discrete group because funds are withheld from them for elective abortions. More importantly, however, because poverty is a significant medical factor in the determination whether termination of pregnancy is a necessary and desirable health decision, the Hyde Amendment operates as an affirmative health burden which is imposed on the poor and only on the poor. And this burden attaches to the constitutionally protected decision whether to terminate pregnancy and not to any other health decision.

Because the Hyde Amendment burdens the exercise of fundamental rights of privacy and because its burden is imposed upon a suspect class, in order to sustain the Hyde Amendment the government must demonstrate that a compelling interest justifies the legislation and that it constitutes the least restrictive means of achieving such an interest. The government has not met that burden in this case. Indeed, as is evident from the record, Congress' express purpose to limit abortions by enacting the Hyde Amendment bears no rational relationship to this special burden imposed on the poor, and constitutes an unlawful attempt to legislatively override this Court's decision in Roe v. Wade, 410 U.S. 113 (1973). Whatever legitimate fiscal and social considerations might be hypothesized for so limiting Medicaid benefits fail to justify the means employed by the Hyde Amendment. Ironically, any such considerations actually support a policy of Medicaid reimbursement for all therapeutic abortions.

In short, under any analysis, the Hyde Amendment constitutes a violation of the guarantees of Due Process and Equal Protection which lie at the core of our constitutional structure.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Brief Amicus Curiae on behalf of the National Council of Churces of Christ in the U.S.A., amicus United Presbyterian Church submits that the district court did not err in holding that the Hyde Amendment is unconstitutional.

March 20, 1980

Respectfully submitted,

SANFORD JAY ROSEN
KATHLEEN J. PURCELL
ROSEN, REMCHO & HENDERSON

Attorneys for Amicus Curiae
the United Presbyterian
Church in the U.S.A.

MOTION FILED
MAR 21 1980

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION AND WELFARE

Appellant

v.

CORA McRAE, ET AL.

Appellees

MOTION OF COALITION FOR HUMAN JUSTICE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

JAMES G. KOLB, ESQ.
414 Hungerford Drive #350
Rockville, Maryland 20850
Attorney for
Coalition for Human Justice

IN THE
SUPREME COURT OF THE UNITED STATES

October Term
1979

No. 79-1268

Patricia R. Harris, Secretary of Health, Education, and Welfare

Appellant

v.

Cora McRae, Et Al.

Appellee

MOTION OF COALITION FOR HUMAN JUSTICE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus Curiae, Coalition for Human Justice, moves for leave to file brief to support appellant, and says as follows:

1. Parties have not been contacted for consent because of time constraints, and thus consent of parties has not been obtained.

2. The Coalition for Human Justice is an unincorporated association of mothers who are welfare recipients and low-income people which has existed since 1974. The applicants interest is in representing the interests of the low-income persons who are not adequately represented by the professional organizations. The applicant has the perspective of the recipient of services that are here at issue.

3. The facts or questions of law which have not been, and will not be adequately represented by the parties, are as follows:

   a. The prevalence of the application of the criteria of economic need is not argued from the perspective of the recipient.

b. The trial court cited lack of money or education as the sole justification for abortion in many examples.
c. The need to balance health care against abortion must be put in perspective.
d. The question must be raised and decided as to whether enforced socio-economic deprivation and its immediate effects on poor women can justify government funded abortions.
e. The argument must be made that the personal impairment caused by poverty will not be relieved by a program of Medicaid funded abortions.

4. These questions are relevant because they provide a background for the Court to measure the Constitutional dimensions of the socio-economic deprivations and the attempted cure by abortion funding.

5. Applicant believes that the questions will not be presented by the parties because their perspective differs and the close interest and urgency of the applicants is not present in the parties.

JAMES G. KOLB, ESQ.
414 Hungerford Dr. #350
Rockville, Md. 20850
Attorney for Amicus Curiae
Coalition for Human Justice

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE
Appellant

v.

CORA McRAE, ET AL.
Appellees

BRIEF AMICUS CURIAE OF
COALITION FOR HUMAN JUSTICE

The Coalition for Human Justice is an unincorporated organization, being in existence since 1974. Membership consists primarily of low-income people, welfare recipients, and persons from disadvantaged backgrounds. The sole concern of the organization is to give public attention to those issues which adversely affect the poor, and to advocate change in these areas.

The Coalition in concerned that the interests of low-income people are not adequately represented by professional organizations speaking in favor of abortion funding on behalf of the poor.

The question of welfare abortion funding is, in many ways, central to the larger issue of how our society intends to deal with the problem of poverty itself.

The appellees in this case argue that abortion is justified in proportionately higher numbers of Medicaid obstetrical cases than among the general population. And it is

noted that the increased maternal health problems of poor women may be directly attributed to those poverty-related conditions -- substandard housing, poor nutrition, and insufficient preventive medical care -- which adversely affect the physical and psychological well-being of virtually all economically disadvantaged people.

It is a fact that poverty diminishes life It lowers the average age of life expectancy, increases infant and maternal mortality rates, and isolates the disadvantaged from the mainstream of society. The poverty environment, in fact, breeds personal and social adversity at every level.

The most conspicuous defect in the lower Court's abortion mandate is that in theory it reduces a complex social and economic crisis to the status of a temporary medical disorder. The many ill effects of overcrowded slum housing with its lack of adequate heat and sanitation services will persist as long as needy persons are denied access to decent, livable homes. And so long as it is more profitable for the food marketing and health care delivery systems to favor the non-poor, dietary and medical deficiencies will remain a problem among the indigent.

If reality is not to be totally ignored, this Court must take into consideration the fact that the political demands of the poor have consistently focused on adequate food and housing, on jobs and education, and ultimately, on more equitable access to the legislative process. The lower Court, in basing a substantial part of its opinion on the tragic personal consequences of poverty, has, in effect, affirmed the legitimacy of these demands. It must likewise be noted that the social reforms sought by economically disadvantaged people have never included a right to abortion; restrictive abortion statutes themselves were never a target of Civil Rights era protest, and early efforts to repeal anti-abortion laws were, in fact, denounced by a number of civil and human rights leaders.* Public opinion polls have been remarkably consistent in showing that the lower the

financial status of a person, the less likely it is that the person will approve of legal abortion.**

Because a free abortion program fails even to acknowledge the material needs of welfare recipients, it is likely to be seen by many as just another way to take advantage of poor women. One can hardly blame low-income people for being suspicious if the federal government, which still has made no meaningful attempt to alieviate problems

*_The Black Panther_, July 4, 1970.
The Choice: The Issue of Black Survival in America, Samuel F. Yette, 1975 Berkley Medallion Books.
Commission on Population Growth and the American Future, separate statement of commission vice-president Grace Olivarez, March 1972.
Dick Gregory, _Ebony_ Magazine, Oct. 1971.
Planned Parenthood Conference, Kansas City, April 1971.
C. E. Vincent, C. A. Haney, and C. N. Cochrane, "Abortion Attitudes in Poverty-Level Blacks," _Semin. Psych_. 1970, pages 309-317.

** Judith Blake, "Abortion and Public Opinion," _Science_, February 12, 1971, pages 540-549.
DeVries and Associates Survey, March 7, 1975.
Gallup Poll, March 1976.
See also Michigan referendum on legalization of abortion, November, 1972. In only two counties did a majority vote in favor of abortion. They were Ann Arbor and Birmingham Hills -- the two wealthiest. Among inner-city poverty areas, the anti-abortion vote was 80% -- the highest in the entire state.

related to housing, jobs, education, day care services, and preventive medicine, now offers unlimited access to abortion precisely because these needs remain unmet.

Poverty itself is an economic condition. A court-ordered policy of Medicaid abortion reimbursements, therefore, has the effect of discrediting efforts to provide material assistance in that it allows abortions to be widely utilized in response to problems which are wholly economic and social in origin.* Clearly, implementation of the lower court's abortion ruling involves no escalation of efforts to reduce physical and emotional illness among women prior to pregnancy, nor among the general poverty-level population, and it does nothing to improve the chances for curative treatment for pregnant women who happen to suffer from these afflictions. By isolating pregnancy and birth as impediments to health, the Medicaid abortion program literally forces pregnant women to act as scapegoats for society's brutal, and often deliberate, neglect of the poor.

The theory that poverty-related health problems tend to jeopardize pregnancy outcome in welfare dependent women can be applied with equal validity to induced abortion procedures. A woman whose general medical condition is poor has least resistance to infection; pre-existing medical problems are more likely to remain undiagnosed in abortion than in on-going prenatal care, and early post-operative complications, such as heavy bleeding or hemorrhage, which are a possibility in all out-patient abortions, present the immediate need for emergency medical treatment that is least accessible to financially underpriveleged women.*

* *Doe v. Bolton, 410 US*

* *Faulty or inaccurate diagnosis, and/or allegedly negligent aftercare have been primary cause of damages sought in a number of medical malpractice claims against freestanding abortion clinics in the District of Columbia. See, for example, DC Superior Court civil actions cited below: CA 3226-72 Tibbs v. Preterm, uterine rupture, hemhorrage, hysterectomy required; CA 3048-74 Reany v. Preterm, inadequate aftercare, post-abortion sickness and hospitalization; CA 3817-74 Doucette v. Preterm, serious illness after abortion; CA 2917-76 D'Angelo v. Preterm, infection, misdiagnosed continuing pregnancy; CA 3214-75 Johnson v. Preterm, perforation of uterus and of cervix, refusal to provide suitable aftercare, hysterectomy; CA 7603-76 Caballero v. Preterm, misdiagnosed ectopic pregnancy, abortion, and massive, permanent brain damage; CA 2631 Sponaugle v. Preterm, abortion, IUD not removed, chronic infection and total abdominal hysterectomy; CA 7902-76 Lee v. Preterm, misdiagnosed ectopic pregnancy at time of abortion; CA 13195-78 Land v. Preterm, rupture of uterus, massive bleeding, improper care, hysterectomy; CA 11799-79 Zimmerman v. Preterm, abortion, laceration and perforation of uterus; CA 9761-73 Wheeler v. Summit, perforation of uterus; CA 6362-75 Rawley V. Summit, septic abortion; CA 10445-77 Wheaton v. Summit, improperly diagnosed ectopic pregnancy; CA 4464-77 Shinney v. Hillcrest, incomplete abortion; CA 7045-78 Jones v. Jackson and McLeod (Hillcrest), wrongful diagnosis of pregnancy, two abortion procedures on non-pregnant woman; CA 3533-75 Vallejo v. Sherman, refusal to provide aftercare, hemorrhage following incomplete abortion; CA 1178-75 Quinn v. Sherman, misdiagnosed incomplete abortion; CA 2834-78 Jacobs v. Women's Medical Center, refusal to respond to patient complaints, incomplete abortion, perforated uterus, acute pelvic inflammatory disease; CA 9996-79 Mitchell v. Laurel Clinic, incomplete abortion; CA 5783-75 McDowell v. Sherman, patient death due to infected and incomplete abortion; CA 466-79 Dhillon v. Laurel Clinic, septic and incomplete abortion; CA 5666-75 Williams at el v. Laurel Clinic, death of abortion patient.*

There are many other Superior Court civil suits

The medical establishment itself cannot be held entirely blameless for the double standard in health care that exists in this country today. Because of a tendency on the part of doctors (particularly in public institutions and teaching hospitals) to view medically indigent women as high-risk maternity patients, the poor receive Caesarean sections in disproportionately high numbers, are more frequently subjected to unnecessary hysterectomies, and account for the vast majority of sterilization abuse cases.** Low-income women have likewise been the targets for experimental birth control devices and drugs, as revealed in a number of articles dealing with the Dalkon Shield, an I.U.D., and the injectable long-term contraceptive, Depo-Provera.***

These and other violations of the medical rights of poor women demonstrate that the above-average health risks associated with poverty may be compounded by irresponsible behavior on the part of medical professionals as well as by governmental neglect.

Directly related to the controversy over financial deprivation as a measure of abortion "need" is the question of voluntarism. Most corrective surgery is done for objective reasons -- reasons related to a condition that can be directly observed (i.e. appendectomy, tonsilectomy, etc.). Abortions, however, are done most often for subjective indications, involving a patient's

involving incomplete and/or septic abortions; and a number of additional claims similar to these have been filed in US District Court in Washington.

** *"Epidemic of Caesareans,"* Seven Days, *May 5, 1978;* Adrienne Rich, Of Woman Born, *New York, Norton 1976;* Relf v. Weinburger, *US District Court, Washington, civil action no. 73-1557 and 74-243.*

*** *See* Mother Jones *Magazine, Nov. 1979, for example.*

environment, her attitude towards giving birth, and -- sometimes, most importantly -- her response to the attitudes of others. Thus the decision to undergo an abortion is one that is undeniably influenced by outside pressures.

Since it is obvious that women do not submit to abortions with cheerful enthusiasm or out of grateful obedience to Roe v. Wade, it should likewise be apparent that abortion is never a truly voluntary form of family planning in the sense that it parallels the decision of a non-pregnant woman to use contraception as a means to postpone or regulate childbearing.

Direct coercion takes many forms. A woman who is denied access to (or information about) alternatives is given no choice; a male partner or a member of a woman's immediate family may threaten reprisal if an abortion is refused; and anti-abortion activists have charged -- with considerable validity, it seems -- that professional clinic counselors are often trained to manipulate insecurity in ambivalent clients.

The possibility of compulsory abortion has likewise been raised on a number of occasions. At a White House Conference on Food and Nutrition, held in Washington in December of 1969, a special medical panel set up to address the issues of "welfare" and "health" recommended that Congress enact a law providing mandatory abortion for any unmarried woman found to be within the first three months of pregnancy, and mandatory sterilization of any such woman giving birth out of wedlock for a second time. The panel, which included such notable authorities as Dr. Charles U. Lowe of HEW's National Institutes of Health and the late Dr. Alan Guttmacher, president of Planned Parenthood-World Population,

finally withdrew the proposal because of objections by civil rights workers.*

In July of 1971, a 22-year-old mental patient was ordered by a judge to undergo an abortion despite the fact that she wished to keep her baby. The abortion was authorized on the grounds that continuation of pregnancy would harm the "physical and mental health" of the woman.** And, more recently, the chairman of the Texas State Board of Human Resources, an agency charged with overseeing the state's welfare assistance program, called for mandatory abortions and sterilizations of welfare mothers to prevent them from giving birth to children they cannot afford.***

But probably the most subtle, and the most widespread, form of coercion is economic need. Its application has become so prevalent, so "acceptable" in some circles, that the appellees in this case actually cite such circumstances *in favor* of federal abortion funds.****
Both opponents and proponents generally concede that abortion is the world's most primitive, dangerous, and expensive form of birth control, and that it should never be adopted as a preferred family planning method. As part of federal welfare assistance, the funds used to reimburse abortion providers are subtracted from money

* *Yette, op cit, pages 111-116.*

***San Jose News, July 7, 1971; Superior Court case no. LPS 21985, filed 7-2-71.*

****Washington Post, February 28, 2980, page A9.*

**** *See McRae v. Harris, pages 102, 113, 123, 124, for examples in which lack of money or education amounts to the sole justification for abortion.*

appropriated for anti-poverty programs; no extra allowance has ever been made available for this purpose. Thus the financial beneficiaries of Medicaid abortions are the vendors themselves, and not the needy, and such virtually unconditional subsidies give abortion clinic owners and operators a financial incentive to recruit poor women as clients. It thus encourages them, in a sense, to capitalize on the personal tragedies of poverty.

Abortion, in fact, does nothing whatever to redistribute work or wealth; it does not improve the status of the low-income woman in any way.

The nation's continuing failure to seek and implement positive, effective, political measures to improve the lives of poor people, coupled with an attitude held by many in the health care professions that poverty (and its inevitable harm to its victims) can be treated as a biological defect, has produced a classic "catch-22" situation: As long as the poor are denied access to the basic necessities of life, abortion providers will claim that poor women are medically unfit to procreate. And as long as abortions are -- in any way -- justified by social neglect, genuine economic reform will be seriously jeopardized.

Every time a pregnant woman is given an abortion because she can only hope to raise her child in slum housing, because she cannot afford adequate clothing, food, or transportation, or because she has been denied a fair chance at education, employment, and day care services, we make it less likely that any woman can hope for change in these areas. And thus we further institutionalize the oppression of the underclasses. Precisely because this kind of "medically necessary" abortion accomodates

political injustice, it serves to perpetuate it.

In no instance is the utter obscenity of America's disregard for the poor more clear than in the case of an AFDC mother whose child has died of pneumonia. While heat in her apartment might have prevented the baby's sickness, the knowledge that she could instead have had a free legal abortion is of no consolation whatever. The moral outrage of this nation, and of the Court, must be directed -- not at the fact that such children are born -- but at the circumstances under which many die, and at the deplorable conditions which continue to threaten the lives of millions of underpriveleged human beings, which destroy hope and incentive, and which breed violence, fear, and despair.

This Court in 1977 (Maher v. Roe) ruled that the states (and, by implication, the federal government) may favor childbirth over abortion. The decision of the lower court in McRae v. Harris says, in effect, that this is not the case where the poor are concerned. If the latter opinion is upheld, it will impose a double standard more divisive than any in recent history. In no way is this action a simple matter of whether or not Medicaid-eligible women should have the same access to abortion as do more affluent women who are able to afford, not only abortions, but virtually every other thing which poor people find themselves unable to purchase. Instead, the real question raised by this litigation is whether enforced socio-economic deprivation and its immediate effects on poor women justify government funded abortions -- all other factors being unequal.

As shown by testimony of plaintiffs in McRae, poor physical and emotional health, as well as poor prognosis for treatment and recovery, are consequences of living conditions imposed on an entire class of people by an economic system which is undeniably unfair, and by a political system which is, in the minds of many, totally unaccountable to the poor.

The abortion policy sought by appellees in this case will neither bring about equality nor compensate for the lack of it. At best, it is an insincere approach to a grave human problem; at worst, it is a contemptible political move to avoid facing the problem by reducing the numbers of those people believed to personify the problem.

Amici urge that the Court find that the personal impairment caused by poverty will not be relieved by a program of Medicaid abortions, and that, indeed, the situation of poor women will be exacerbated by such a policy. Abortion is no more a gift to the poor than are those unfortunate circumstances which so often motivate it.

Respectfully submitted,

James G. Kolb, Esq.
414 Hungerford Drive #350
Rockville, MD. 20850

Attorney for Amicus Curiae
Coalition for Human Justice

MOTION FILED
MAR 15 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA HARRIS, Secretary of Health, Education & Welfare, APPELLANT

v.

CORA McRAE, et al., APPELLEES

On Appeal from the United States District Court for the Eastern District of New York

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN IN SUPPORT OF THE APPELLANT

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013

Counsel for Amicus

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

The Legal Defense Fund For Unborn Children is an organization whose interest is to protect the constitutional rights of unborn children.

The amicus presents legal matter to the Court which is not presented by the parties.

The amicus tenders evidence to show that Roe v Wade, 410 US 113 (1973) is based on false evidence and millions of lives have been unconstitutionally exterminated. Of course, this requires the overruling of that case.

If Roe v Wade were overruled, it would be dispositive of this case.

The amicus also adopts by reference the new evidence presented in the brief in support of the Motion To Appoint Counsel For Children Unborn And Born Alive. That evidence shows many Roe v Wade killings to be murder in the first degree.

WHEREFORE, the Court is moved to grant this motion for leave to file this amicus brief.

Alan Ernest
Counsel for Amicus

INDEX

Brief by amicus curiae 1

Summary of Argument 1

Argument 2

PART I: Roe v Wade is Based on False Evidence 2

PART II: The Court's Procedures are Unconstitutional 7

PART III: The Case Against the Supreme Court 11

PART IV: The Supreme Court has Overthrown the United States Constitution . . . 15

Conclusion 23

AUTHORITIES

Cases

Baxter v Palmigiano, 47 L Ed 2d 810 14

Dartmouth College v Woodward, 4 Wheat. 518 . . . 17

Marbury v Madison, 1 Cracnh 137 13,22

Ogden v Sanders, 12 Wheat. 212 17

State v Moore, 25 Iowa 128 6

The Justice Case, 3 Trials of War Criminals before the Nuernberg Milirary Tribunals . . . 19

Texts

Archbold, J.F., Archbold's Criminal Procedure, Pleading and Evidence(6th ed 1853) 6

Berger, R., Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). . 20

Denman, T., M.D., An Introduction to the Practice of Midwifery (1802) 4

Hodge, H.L., M.D., The Principles and Practice of Obstetrics (1864) 4

Transactions of the American Medical Assn. . . . 6

AMICUS CURIAE BRIEF

For the 57th time, the Supreme Court is petitioned to overrule its 1973 abortion decision, Roe v Wade, 410 US 113. The grounds are set out below in the SUMMARY OF ARGUMENT.

SUMMARY OF ARGUMENT

1. The Supreme Court is petitioned to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been unconstitutionally exterminated. See PART I, infra pages 2-7.

2. It is also alleged that, independent of the evidence in Roe v Wade, the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings so palpably violate due process of law as to leave no question that the exterminations are unconstitutional. See PART II, infra pages 8-11.

3. It is further alleged that many of the killings that the U.S. Supreme Court asserted to legalize in Roe v Wade are murder in the first degree. The evidence presented in the MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE, filed in this case, is incorporated herein by reference.

4. It is further alleged that the Roe v Wade killings violate federal and state positive criminal statutes. The U.S. Supreme Court is herein charged with crim-

inal falsehood and criminal extermination, including mass murder in the first degree. See PART III, infra pages 11-14.

5. It is alleged that the judges of the United States have combined to overthrow the Constitution of the United States and to establish a government by Judiciary, founded on fraud and murder. See PART IV, infra pages 15-22.

ARGUMENT

PART I
ROE v WADE IS BASED ON FALSE EVIDENCE

It is alleged that Roe v Wade, 410 US 113, is based on false evidence and millions of lives have been unconstitutionally exterminated. The documentation to prove this charge has been repeatedly submitted to the Supreme Court.

This documentation was succinctly outlined in counsel's 16th petition to overrule Roe v Wade(Unborn Child Roe v. John J. Sirica, Judge, United States District Court for the District of Columbia, (78)A-215):

"1. even the Supreme Court admitted in Roe v. Wade that if the unborn were 'a "person" within the language and meaning of the Fourteenth Amendment' then the case for abortion for convenience 'of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment,' and

"2. the express, universal terms of the Fourteenth Amendment ('nor shall any State deprive any person of life . . . without due process of law') on their face, protect the lives of the unborn, as everyone else, and

"3. the holdings of Chief Justice John Marshall (that can be traced through the Constitution, The Federalist Papers, and The Federal Convention of 1787) show that the Supreme Court had no lawful authority to construe an exception to express, universal terms (such as 'any person') unless the Court could prove the exception to the express, universal terms beyond a reasonable doubt, and show that 'had this particular case been suggested' to the framers the 'language would have been so varied, as to exclude it,' and

"4. the Supreme Court presented false evidence to support its conclusion in Roe v Wade that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn,' and but for the false evidence, there is not even a credible foundation, much less a compelling one, for denying the protection of the express, universal terms 'any person' to the lives of the unborn, and

---

Summary of False Evidence

In introduction, at the time the Fourteenth Amendment was adopted in 1868, most states had already enacted positive statutes that made abortion a crime unless it were necessary to save the life of the mother. Within a few years, these criminal abortion statutes were virtually universal.

Consequently, any theory of a constitutional right to abortion on demand faced an impossible contradiction: How is it possible that the people who adopted the Fourteenth Amendment had enacted positive criminal statutes to protect unborn life, and at the

same time, without a single word of explanation, intended to imply an exception to the express, universal terms that not "any person" can be deprived of life without due process of law, and to create a constitutional right to abortion on demand?

To resolve that fatal contradiction, the Court asserted the hypothesis that when the criminal abortion laws were first enacted, the laws were not intended to protect unborn life, but rather were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

(A.) The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v Wade, 35 L Ed 2d at 174. This was asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and Lloyd, A Hundred Years of Medicine 19(1943). But this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The reference did not even mention the abortion operation.

However, the 19th century obstetric authorities throughout the Western World prove the Court's assertion of fact to be false. These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96(1802)(English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530(4th American ed. 1852)(French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293(1864)(American physician). In short, the obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus" to "come on," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, 99. One 19th century physician traced this operation back almost 2000 years.

(B.) The Supreme Court next asserted, "Abortion mortality was high." Roe v Wade, 35 L Ed 2d at 174. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities also prove this assertion of fact to be false.

(C.) Upon the two false assertions of fact, the Supreme Court infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v Wade, 35 L Ed 2d at 174.

(D.) From the inference that the criminal abortion laws were not intended to protect the unborn, the Court further inferred that, likewise, the framers of the Fourteenth Amendment did not intend it to protect the lives of the unborn, "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v Wade, 35 L Ed 2d at 180. This conclusion rests entirely on inference.

This pyramid of inference is shown to rest on assertions of fact that are false.

Moreover, as independent corroboration of the purpose of the criminal abortion statutes to protect the unborn, 19th century authorities in criminal law, e.g., 2 Archbold, Archbold's Criminal Procedure, Pleading and Evidence 295(6th ed 1853); medical jurisprudence, e.g., F. Wharton and M. Stille, M.D., A Treatise on Medical Jurisprudence 339, 927(2d ed. 1860); medicine, e.g., 13 Transactions of the American Medical Association 56-58 (1860); as well as state supreme courts, e.g., State v Moore, 25 Iowa 128, 135-136(1868), did expressly affirm that these criminal abortion statutes were intended to protect the lives of the unborn.

Consequently, not only is the Supreme Court's inference about the purpose of the 19th century abortion laws shown to rest on false assertions of fact, but there is no other evidence to come to the rescue and save the Court's conclusion. The 19th century authorities prove the very contrary.

In Summary, the Supreme Court bore the burden of proving beyond a reasonable doubt that the express, universal terms of the Fourteenth Amendment, "any person," did not include the unborn. Yet, the Supreme Court did not cite one 19th century authority that expressly affirmed that the unborn were not persons within the language and meaning of the Fourteenth Amendment, or that there was a constitutional right to abortion on demand; and the Court's conclusion that the 19th century abortion laws were not intended to protect the unborn is shown to rest on false evidence. To the contrary, the 19th century authorities demonstrate that the people who adopted the Fourteenth Amendment not only intended to protect the lives of the unborn, but had already enacted criminal abortion statutes to do so in fact.

"5. the truthful history corroborates that the express, universal terms 'any person' include the unborn, as they do all categories of persons, and

more certainly than many groups. The Supreme Court included corporations and aliens as a 'person' within the language and meaning of the Fourteenth Amendment merely on the strength of the express, universal terms 'any person,' without any independent corroborating evidence whatsoever. (The unborn being the only persons ever excluded from the terms 'any person')

"In short, EXHIBIT A shows that the Supreme Court violated the very letter of the Constitution as well as its spirit, and condemned millions of victims to death whom the Constitution endeavors to preserve. . . . . (A)nd there appears to be no defense that will not amount to a claim that the Supreme Court is above the law."

PART II
THE COURT'S PROCEDURES ARE UNCONSTITUTIONAL

Completely independent of the Court's evidence, supra PART I, it is also alleged that the procedures used by the Supreme Court to effect and maintain the Roe v Wade killings are in such manifest conflict with due process of law as to leave no doubt that the killings are unconstitutional.

As counsel's 17th petition to overrule Roe v Wade pointed out (Gaetano v. Earl Silbert, United States Attorney for the District of Columbia, No. 78-427, cert denied 58 L Ed 2d 324):

"The evidence in Roe v Wade aside, the procedures used to effect the Roe v Wade killings alone condemn the killings as illegal. The Nuremberg

court, in outlining the case against the Nazi judicial system, noted that many victims were executed after trials which 'did not approach even a semblance of fair trial':

'In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them. . . . They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel.' [The Justice Case infra p. 19, at 1046.]

" The U.S. Supreme Court has, in broad form, used these very procedures to effect the Roe v Wade killings. For example, in Roe v Wade, the Court used evidence found by itself, which the parties had not cross examined in a judicial proceeding. The Attorney General of Georgia, a party, requested leave to cross examine the Supreme Court's evidence:

'The Court has taken judicial notice of innumerable facts . . . some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter evidence since they form the foundation of the Court's opinion.' Petition for Rehearing at 4, Doe v Bolton, 35 L Ed 2d 201(1973).

"But the Supreme Court would not allow its evidence to be cross examined by the party. Pet. Rehearing denied, Doe v Bolton, 35 L Ed 2d 694(1973).

"And year after year, the Supreme Court has denied these applications to present evidence on behalf of the unborn victims to show that the unborn are persons whose lives are protected by the U.S. Constitution. This new evidence shows the Supreme Court's evidence to be false; and the Supreme Court will not allow the evidence to be presented. [1]

---

1. In Planned Parenthood of Central

"And no abortion case before the Court appears to have had counsel to especially represent the unborn and defend their constitutional right to

---

Missouri v Danforth, 49 L Ed 2d 788(1976)(the first major abortion case after Roe v Wade) eight lawyers, as counsel or amici, submitted an amicus curiae brief, outlining the evidence in PART I, supra, and alleging that "newly discovered evidence indicates that Roe v Wade rests upon factual errors that require the overruling of that case."

Since the purpose of amicus briefs is to present legal matter to the Court, not presented by the parties, so that the Court will not go wrong on vital national affairs, the Court seldom rejects amicus briefs. Stern and Gressman, Supreme Court Practice 728 (5th ed 1978). The landmark constitutional decision which applied the Fourth Amendment exclusionary rule to the States was predicated upon argument by amicus curiae, not the parties. Mapp v Ohio, 367 US 643, 646 n.3(1961). And in the Missouri abortion case it was only the amicus brief that presented the newly discovered evidence showing Roe v Wade to be based on false evidence.

But the Supreme Court would not allow this amicus brief to be filed. Motion to file by D.C. Right to Life Committee, et al., denied 46 L Ed 2d 633(1976). After refusing to allow this "newly discovered evidence," showing Roe v Wade to be based on false evidence, to be presented on behalf of the unborn, the Court proceeded to nullify parts of the Missouri abortion statute, and effectively extended the killings in the name of Roe v Wade.

And the Supreme Court either refused permission to file amicus curiae briefs, or refused to fully and fairly hear amicus curiae briefs, which presented this new evidence, in Colautti v Franklin, 58 L Ed 2d 596; Bellotti v Baird, L Ed 2d ; Anders v. Floyd, 59 L Ed 2d 442; and Ashcroft v Freiman, affd 59 L Ed 2d 630.

life. [2]

---

2. The Supreme Court has repeatedly refused to allow counsel to represent children unborn or born alive in its judicial proceedings, and to defend their constitutionally protected right to life.

In Doe v Bolton, the Attorney General of Georgia requested the Court to allow "representation of a guardian ad litem for that fetal entity and for its right to develop to birth." Petition for Rehearing at 5. But the Court denied the request.

In Colautti v Franklin, 58 L Ed 596, the Court again extended the killings in the name of Roe v Wade, after refusing to allow counsel to represent the victims and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. Motion denied at 57 L Ed 2d 1131.

In Anders v Floyd, 59 L Ed 2d 442, the Court again refused to allow counsel to represent the victims, and present the evidence, supra PART I, to show that the victims were being unconstitutionally exterminated by false evidence. 59 L Ed 2d 442.

In Bellotti v Baird, L Ed 2d , the Court refused to allow counsel to represent the victims and present new evidence (See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE in this case) to show that the victims were being murdered. 59 L Ed 2d 451.

In Ashcroft v Freiman, 59 L Ed 2d 630, the Court affirmed an appeal after refusing to allow counsel to represent the victims and defend their constitutional right not to be murdered.

And the Supreme Court refused to allow counsel to represent the victims and defend their constitutional right not to be murdered in Baird v Sharp, cert. denied 60 L Ed 2d 1057, and Preterm v King, cert. denied 60 L Ed 2d 1057.

"In summary, without counsel representing the victims, it appears that the Supreme Court itself produced evidence to condemn the victims; denied permission to cross examine its evidence; and denied requests to present evidence on behalf of the victims, even evidence showing the Court's evidence to be false. Exterminations pursuant to these procedures cannot be pretended to be lawful."

Thus, the Court has repeatedly heard and decided abortion cases, and struck down state abortion laws, and effectively extended the killing in the name of Roe v Wade, and refused to appoint counsel to represent the victims and present new evidence, never presented by the parties, to show that the victims are being exterminated in violation of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree.

It can not be pretended that it is any longer the government of the United States- any government of Constitution and laws- wherein judges presume to decree killing to be a constitutional right and refuse to even listen to the facts.

PART III
THE CASE AGAINST THE SUPREME COURT

Counsel's 8th(Gaetano v Louis Oberdorfer, Judge, United States District Court for the District of Columbia, No. 77-1358), and each subsequent petition, specified the criminal statutes believed violated, and charged the Supreme Court with criminal falsehood and criminal extermination:

"THE CASE AGAINST THE SUPREME COURT

"The evidence appears to support the charge that some Justices of the U.S. Supreme Court have violated federal criminal statutes, such as:

"18 USC 242, Deprivation of rights under color of law,- It is a crime for government officials, acting under pretense of law, to willfully deprive persons of their rights secured by the U.S. Constitution. The documentation in EXHIBIT A, at the very least, permits reasonable people to conclude beyond a reasonable doubt that the unborn are persons whose lives are protected by the U.S. Constitution. The evidence that Justices specifically authorized killings throughout the United States, by a willfully false construction of the Constitution, would certainly permit a jury to conclude beyond a reasonable doubt that Justices, acting under pretense of law, had deprived millions of unborn persons of their right to life protected by the U.S. Constitution.

"22 D.C. Code 201, D.C. abortion statute,- The felony abortion statute only permits abortions in the District of Columbia to preserve the mother's life or health. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the positive criminal statute, by a willfully false construction of the Constitution, would surely permit a jury to find beyond a reasonable doubt that Justices had aided and abetted those killings.

"22 D.C. Code 105 a, Conspiracy,- When Roe v Wade was decided, non-therapeutic abortions were illegal, not just in the District of Columbia, but generally throughout the United States. The evidence that Justices specifically authorized non-therapeutic abortions in violation of the States' positive criminal statutes, by a willfully false construction of the Constitution, would appear to permit a jury to find beyond a reasonable doubt that Justices conspired to effect those killings.

"18 USC 1503, Obstruction of justice,- It is a

crime to endeavor to obstruct or impede the due enforcement of the law of the land, even by conduct that is otherwise legal, if the motive is corrupt or dishonest. The evidence that the Supreme Court has been petitioned year after year to overrule Roe v Wade on the grounds that it is based on false evidence and millions of lives have been illegally exterminated, and year after year the Supreme Court summarily refused to even listen, would appear sufficient to permit a jury to conclude beyond a reasonable doubt that Justices had dishonestly endeavored to obstruct or impede the due enforcement of the law of the land.

"18 USC 1001, False statements,- The evidence that some Justices, within their official jurisdiction, made or adopted false statements in Roe v Wade, and repeated petitions indicated the false statements to be willful and knowing, might be sufficient to permit a jury to conclude beyond a reasonable doubt that some Justices had made false statements within 18 USC 1001.

"18 USC 371, Conspiracy,- It is not only a crime to conspire to commit any criminal offense, but also to conspire to defraud the United States by misrepresentation or the overreaching of those charged with the carrying out of the governmental intention. The evidence already mentioned would appear sufficient to permit a jury to find beyond a reasonable doubt that Justices had not only conspired to commit the above mentioned crimes, but also to defraud the United States.

"18 USC 1621, Perjury,- An oath of office to uphold the Constitution would probably not, under ordinary circumstances, support a charge of perjury. However, Chief Justice John Marshall held that for "judges" to "swear" to discharge their duties "agreeably to the constitution" and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavours to preserve" is worse than "solemn mockery," it is a "crime." Marbury v Madison, 1 Cranch at 179-180.

And counsel's 25th petition, and each subsequent petition, to overrule Roe v Wade presented the new evidence, adopted herein by reference, which shows many Roe v Wade killings to be murder in the first degree. The Justices who asserted to legalize those killings may now face the death penalty in very many states.

The Supreme Court has never attempted to show the new evidence to be wrong, much less to prove the charges to be false.

And failure to deny a charge can be taken as an admission that the charge is true. "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick On Evidence 353 (1972). "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact..... Silence is often evidence of the most persuasive character." Baxter v Palmigiano, 47 L Ed 2d 810, 822 (1976). And the rule is ancient. As Socrates cross-examined at his trial over 2000 years ago, "you are silent, and have nothing to say. But is this not rather disgraceful, and a very considerable proof of what I was saying?" And again, "I may assume that your silence gives consent." Apology in Plato 41, 45(Jowett transl. Classics Club 1942). See also, 4 Wigmore, Evidence, §§ 1071-1072 (Chadbourn rev. 1972).

PART IV

THE SUPREME COURT HAS OVERTHROWN THE UNITED STATES CONSTITUTION

The evidence shows that the judges of the United States have combined to overthrow the United States Constitution, and to establish a government by Judiciary, founded on fraud and murder.

A.

It can not be contested that America was founded upon the principle that government derives its "just powers from the consent of the governed." This was adopted by the Continental Congress in the Declaration of Independence. While the Declaration may not be law in itself, it provides definitions by which the law is to be understood. Gulf, Colo. and S.Fe Ry v Ellis, 165 US 150, 159-160(1896).

The first sentence of the U.S. Constitution sets out this mother principle of democracies: "All legislative powers herein granted shall be vested in a Congress of the United States." Congress is elected by the people at regular elections, and thus, its laws are derived from the consent of the governed.

The Constitution itself was adopted by the people in convention. The Constitution is thus derived from the consent of the gov-

erned. And Article V of the Constitution provides the means for amending the Constitution, which likewise makes amendments be derived from the consent of the governed.

B.

Under the U.S. Constitution's Article III, the federal judiciary is not elected by the people, and holds office during good behavior, in effect, for life.

The Constitution gives the judges no power to make laws. The lawmaking power, as admitted by the Supreme Court, is the power to make new rules for the future. Ross v Oregon, 227 US 150, 161 (1913).

While the judicial power does not admit to lawmaking, it has been decided that it does admit to determining the meaning of statutes, and the U.S. Constitution. Marbury v Madison, 1 Cranch 137(1803). But the Supreme Court has no power to make new laws under the guise of construction. Pillsbury v United Engineering, 342 US 197, 199.

The rules used by the courts to construe the meaning of the laws are founded in the principle that laws are derived from the consent of the governed. The purpose of construction is to determine the intent of the lawmaker.

Chief Justice John Marshall recognized this "consent of the governed" as the foundation of the rules that the courts must apply in construing the Constitution.

FIRST: The Constitution must be given the meaning "contemplated by its framers."

Ogden v Sanders, 12 Wheat. 212, 332(1827) (dissenting opinion).

SECOND: "(I)n no doubtful case would it pronounce a legislative act to be contrary to constitution." Dartmouth College v Woodward, 4 Wheat. 518, 625(1819).

The foundation under these two rules is too compelling to admit any doubt as to the truth of the two rules.

Since the legitimacy of the Constitution is derived from the consent of the governed, any true construction must give the Constitution the meaning intended by the people who framed and adopted it. The central question is: To what have the people consented. Any policy of construction that disregards the consent of the governed can not be lawful. And to what the people have consented is susceptible to proof by evidence which can be independently verified. Thus the security of a written Constitution.

The second rule is a necessary corollary of the first. The right of the people to govern themselves being so paramount, it takes careful and clear evidence to warrant a conclusion that, in the U.S. Constituiton, the people intended to withdraw from themselves the power to make their own laws on that subject. If, after review of the words of the Constitution, and the historical evidence concerning the meaning of those words, a reasonable doubt remains as to whether the makers of the Constitution intended to prohibit such a law, then

the law must stand as valid. The opinions of unelected officials holding office for life are not to be substituted for the judgments of the peoples' elected representatives unless the conflict between the law and the Constitution is clear.

The decisions of Chief Justice John Marshall are submitted as a faithful execution of these two principles of construction.

C.

In his Farewell Address, Washington warned that the customary means of overthrowing constitutions was by usurpation:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. 35 The Writings of George Washington 229(Fitzpatrick ed. 1949).

D.

The world does not want for examples of democratic constitutions overthrown by the process of usurpation.

Prior to World War II, the German Constitution was thought to be a model of democracy and freedom, "the most liberal and democratic document of its kind the twentieth century had seen," which declared "Political power emanates from the people." W.L. Shirer, The Rise and Fall of the Third Reich

88-89(Fawcett Crest paperback 1969). Hitler came to power "within the terms of the constitution." Id., at 255.

Thereafter, by usurpation, Hitler became the "supreme judge" of Germany. The Justice Case, 3 Trials of War Criminals before the Nuernberg Military Tribunals 1011 (1951). The decrees of this "supreme judge" were obeyed as law. The "supreme judge" presumed to decree murder to be lawful. And this "supreme judge" was unquestioningly obeyed by the Nazi judges.

At Nuremberg, the Nazi judges claimed the defense that they could not be held accountable for their crimes against humanity, including "extermination," because they were bound by the "decrees" of the "supreme judge" of Germany. The Justice Case, supra, 983-85,1010-1014. The Nuremberg court rejected that defense with the observation,"The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, supra, at 985.

Never formally repealed, the Constitution was overthrown by usurpation.

E.

The evidence shows that the judiciary of the United States has set upon a course of usurpation astonishingly similar to that traveled by the Nazi judicial system.

The judges of the United States came to power within the terms of the Constitution. The evidence shows that the judges routinely, as a matter of policy, defy the consent

of the governed, and effectively assert their will to be law. See, R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment(1977). This book sets out evidence to show that the Supreme Court has generally construed the Fourteenth Amendment in defiance of the intent of its framers. Berger concludes, "Such conduct impels one to conclude that the Justices are become a law unto themselves." Id., at 408.

The evidence shows that the Supreme Court uses false evidence to defy the intent of the framers. Supra, PART I.

The evidence shows that the Supreme Court has presumed to decree murder to be a constitutional right. See MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE incorporated herein by reference.

The evidence shows that when it comes to constitutional questions, truth has nothing to do with the federal courts: the will of the judge has become the law.

The evidence, supra pages 7-11, shows that the Supreme Court , in broad form, has used the same procedures to effect and maintain the Roe v Wade killings as the Nazi judges used to condemn their victims:

> In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. The Justice Case, supra, 1046.

The evidence shows that, through Roe v

Wade, the Supreme Court has effectively asserted a second method for the government to condemn persons to death.

The first, set out in the Constitution, is by conviction by an impartial jury for violation of express laws enacted by the people and applicable to all in the state; with right of representation of counsel; and right to confront the accusing evidence and cross-examine it; and right to present evidence on behalf of the accused; and right to be acquitted unless found guilty beyond a reasonable doubt; and provision to stop execution if new evidence is discovered.

The second, set out in Roe v Wade, is for a Tribunal holding office for life(without assistance of counsel to defend the victims) to rule the victims out of the human race as inferiors, in violation of the very letter and spirit of the Constitution.

The evidence, supra, shows that the Supreme Court decreed murder to be a constitutional right, and there does not appear to be any defense that will not amount to a claim that the Supreme Court is above the law,- as Hitler was to Germany so the Supreme Court is to America.

The evidence shows that the Supreme Court is being unquestioningly obeyed by the federal judiciary. See counsel's 34th & 35th petitions to overrule Roe v Wade, Unborn Child Roe v. United States Court of Appeals for the District of Columbia Circuit, No. 79-166; and Unborn Child Roe v.

John J, Sirica, Judge, United States District Court for the District of Columbia, No. 79-188. Those courts have effectively ruled that they were bound by Roe v Wade regardless of any claim that it was wrongly decided. The federal judiciary is willing to enforce, permit, and omit to stop killings that violate the express terms of the U.S. Constitution, and positive criminal statutes, including mass murder in the first degree, without asking even a single question, much less demanding any answers.

The evidence shows that in the courts of the United States, the will of the judge has replaced the consent of the governed as the basis of law. By any definition, this is the overthrow of the United States Constitution.

If it be true, as Chief Justice John Marshall once held in Marbury v Madison, 1 Cranch 137, 163, 176, 178, that "government of laws, and not of men," founded in a "written constitution" deriving its just power from the "supreme" "authority" of "the people" is "the greatest improvement on political institutions," then the overthrow of that government of laws by lawless federal judges may be the most heinous crime in the history of political institutions.

Furthermore, the Declaration of Independence is perverted by the judges to effectively read that "all Men are created equal-equal,- except those created to die for the convenience of others."

CONCLUSION

If it be true, as Jefferson once wrote, that America is an "experiment" to establish that "man may be governed by reason and truth," and that "truth and reason will eternally prevail, however in times and places they may be overbourne for a while by violence," then the facts showing the consent of the governed will ultimately prevail.

And Chief Jusitce John Marshall held, for federal judges to "swear" to discharge their duties "agreeably to the constitution tion," and then "close their eyes on the constitution" and "condemn to death those victims whom the constitution endeavors to preserve," is worse than "solemn mockery," it is a "crime." Marbury v Madison, supra, 179-180. The criminal law will not permit the "dagger of the assassin" to be "concealed beneath the robe of the jurist."

If the United States were being ruled over by a Tribunal of murderers holding office for life, and being blindly obeyed by all federal judges who violate the express words of the Constitution and positive criminal statutes, including mass murder in the first degree, without question, then surely it would be a fraud without parallel in the legal history of the world, and tantamount to the overthrow of the Constitution of the United States.

Alan Ernest
Counsel

Supreme Court, U. S.
FILED
MAR 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA HARRIS, Secretary of Health, Education & Welfare, APPELLANT

v.

CORA McRAE, et al., APPELLEES

On Appeal from the United States District Court for the Eastern District of New York

---

MOTION TO APPOINT COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013

Counsel for Movant

MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE

The Court is moved to appoint Alan Ernest as counsel, or guardian ad litem, to represent the children unborn and born alive in this case.

Alan Ernest is a lawyer in the District of Columbia, and a member of the bar of this Court. His interest is to defend the constitutional rights of children unborn and born alive.

Counsel will present new evidence, unquestionably unparalleled in the legal history of this nation, not presented by the parties. This new evidence is outlined in the attached brief in support of this motion.

The new evidence shows that many of the killings that Roe v Wade asserted to legalize were murder in 1868 and punishable by the death sentence. Obviously, a child whose life was protected by the murder laws in 1868 is a person within the language and meaning of the Fourteenth Amendment. Absent a constitutional amendment, the killings are still murder. Justices who presumed to permit these killings may be subject to the death penalty in very many states.

The counsel also adopts by reference the evidence submitted in the amicus brief by the LEGAL DEFENSE FUND FOR UNBORN CHILDREN. That evidence shows Roe v Wade to be based on false evidence and millions of lives to be unconstitutionally exterminated.

WHEREFORE, the Court is moved to appoint Alan Ernest to be counsel to defend the children unborn and born alive.

Alan Ernest
Counsel

BRIEF

SUMMARY OF ARGUMENT

MANY ROE v WADE KILLINGS ARE MURDER

The evidence will show that many of the killings permitted by Roe v Wade, 410 US 113(1973) were murder in 1868. Since the killings were murder in 1868, then absent a constitutional amendment, the killings are still murder, and Roe v Wade is no law at all.

ARGUMENT

1. Introduction to Evidence

The evidence presented herein will show that, at the time the Fourteenth Amendment was adopted in 1868, the unlawful killing, with malice aforethought, of a child born alive was murder. Killings of children born alive were not treated as a special category, as was abortion.

It is thus absolutely indispensable to examine what "born alive" meant in 1868. It is obvious that, if the life of a child born alive was protected by the murder laws in 1868, then it is a person within the language and meaning of the Fourteenth Amendment.

The evidence shows that in 1868, born alive did not mean natural birth after nine full months gestation; nor did it mean birth after viability ("that is, potentially able to live outside the mother's womb, albeit with artificial aid." Roe v Wade, 35 L Ed 2d at 181). If abortion resulted in a live but unviable child that died as a consequence of its not being able to survive outside the womb, it was murder and punishable by the death penality.

The evidence shows that the hysterotomy is a common method of performing abortions under Roe v Wade. This is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. The legal authorities show that in 1868, such a killing was murder and punishable by the death sentence.

In summary, what was murder in 1868, can not now be decreed a constitutional right. Without an amendment to the Constitution, the killings must still be murder, and the Justices who permitted these killings may be guilty of mass murder in the first degree. This is still punishable by the death sentence in many states.

2. The English Law

The English law, as reflected in the writings of Coke(3 Inst. 50), Hawkins(1 Hawkins ch.13, s. 16) and Blackstone (4 Bl. Com. 198) defined the felonious killing of a child "born alive" as murder, even if the child received the fatal wound in the womb.

These authorities were followed by the English courts in permitting prosecutions of the killing of children born alive as murder. Rex v Senior, 1 Moody CC 346(1832); Reg. v Trilloe, 174 Eng. Rep. 674(1842); Reg. v West, 2 C & K 784(1848).

Most critically, in the English law, a child did not have to be viable to be born alive. In 1848 the leading case of Regina v West, 2 C & K 784, was decided. The indictment for murder alleged that the defendant had inserted a "certain pin" "upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Id., 784-85. The child died shortly thereafter. A

"medical witness" had testified that:

"(I)t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Id., at 786.

The judge, relying on Coke and Blackstone, instructed the jury:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died. .... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Id., at 788.

The case of Regina v West, supra, was presented by the leading English writers as the correct statement of the law of murder. See, e.g., 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783(Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-72 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516(Penrose Am. ed. 6th ed 1866). Consequently, the evidence shows that in the English common law, the abortion of a quick but unviable child that resulted in the child being born alive so prematurely that its death was caused by its inability to survive outside the womb, was murder.

3. The American Law Of Murder In 1868

The English common law of murder of children born alive is significant since American courts used the English common law to construe their murder statutes. Clarke v State, 117 Ala 1(1898); Hamilton v United States, 26 App. D.C. 382(1905).

American courts cited Coke, Hawkins, Blackstone, and the English court decisions, as authoritative precedents on the law of homicide of children born alive. See, e.g., Clarke v State, 117 Ala. 1(1898); State v Winthrop, 43 Iowa 519 (1876). By 1868, leading American legal authorities had specifically cited Regina v West, supra, as the correct law of murder of a child born alive. (As already noted, that case held that if a criminal abortion resulted in the premature delivery of a quick but unviable child that died after delivery as a consequence of its being so prematurely delivered that it could not survive outside the womb, it was murder.) See, e.g., F. Wharton, A Treatise on the Law Homicide in the United States 96-97(1855). By 1868, this appears to be the uncontradicted view.

Consequently, the evidence shows that the life of a quick but unviable child born alive was protected by the murder laws in 1868.

4. The Law Of Murder In 1868 And The Fourteenth Amendment

Since the evidence shows that the life of a quick but unviable child was protected by the murder laws in 1868, the evidence likewise establishes that the child so born alive is a person within the language and meaning of the Fourteenth Amendment.

By seizing upon viability, Roe v Wade permits the killings of quick but unviable children born alive. The Supreme Court presumed to decree the killing of these children to be a constitutional

right without any examination whatsoever to see if these children were persons within the language and meaning of the Fourteenth Amendment. It is a naked decree without any investigation into the law of murder of children born alive.

This raises the question,- Does the Supreme Court have the Hitler-like power to decree murder to be a constitutional right? If invalids were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill invalids? If Jews were protected by the murder laws in 1868, can the Supreme Court decree, without evidence or investigation, a constitutional right to kill Jews? If newspaper editors were protected by the murder laws in 1868, can the Supreme Court, without evidence or investigation, decree a constitutional right to kill newspaper editors?

No doubt the Supreme Court bears the burden of proving, by evidence so conclusive that it will not admit of a rational doubt, that it possesses the power to decree murder to be a constitutional right.

5. The Hysterotomy Abortion Under Roe v Wade

A common way to perform abortions under Roe v Wade is by hysterotomy. See, e.g., Commonwealth v. Edelin, 359 NE 2d 4 (Mass. 1976). A hysterotomy is essentially a Caesarean, in which a live but unviable child is removed from the womb and left to die. See, 1 Hearings Before The Subcommittee On Civil And Constitutional Rights Of The Committee Of The Judiciary, House of Representatives On Proposed Constitutional Amendments on Abortion 397(GPO 1976).

As established by medical testimony during the 1976 House Abortion Hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry. . . .Almost allwere born alive." Id., at 397.

Consequently, by definition, in 1868, these hysterotomy abortions could have been prosecuted as murder.

6. ROE v WADE AND MISTAKE OF LAW

The Supreme Court itself has recognized that constitutional provisions against ex post facto laws do not apply to judicial decisions. Ross v Oregon, 227 US 150(1913). Consequently, if Roe v Wade is a mistake of law, then mass murder is being perpetrated in America. The Roe v Wade hysterotomy killings, by definition under the common law and thus constitutional law, violate the positive criminal murder statutes throughout the United States.

The killings of children born alive have been prosecuted as murder in the first degree, Comm. v Harmon, 4 Barr. 269(Pa 1846)(child thrown in creek); or murder in the second degree, Clarke v State, 117 Ala. 1 (1898)(wife beaten, child die from injuries) or manslaughter, People v Chavez, 77 Cal. App. 2d 621(1947)(child neglected),- according to the facts of the particular case, as in any other homicide.

In connection with these judicial killings, it is relevant to note that the Supreme Court decreed murder to be a constitutional right without any examination whatsoever of the law of murder of children born alive. And as Abraham Lincoln noted, "(I)t is an established maxim in morals that he who makes an assertion without knowing whether it is true or false, is guilty of falsehood; and the accidental truth of the assertion, does not justify or excuse him." 1 The Collected Works of Abraham Lincoln 384 (Basler ed. 1953). Since Lincoln's day, this "maxim in morals" has also been a textbook definition of perjury. See, e.g., 3 Wharton's Criminal Law and Procedure, Sec. 1308, p. 673(12th ed 1957).

Consequently, rational people are entitled to believe, and a jury may be permitted to find, that the process by which the Supreme Court decreed

murder to be a constitutional right is perjury or criminal fraud. It seems reasonable that such judicial killings, after such prolonged deliberation and adherence, could be prosecuted as murder in the first degree. Many states still punish mass murder in the first degree with the death sentence.

It may be that the judges responsible for the judicial killings did not believe that they were breaking the law. But as Mr. Justice Oliver Wendell Holmes once wrote, "Ignorance of the law is no excuse for breaking it." "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but.. ...the lawmaker has determined to make men know and obey." Holmes, The Common Law 41(Howe ed 1963).

It now full well appears that the Justices of the Supreme Court of the United States have presumed to decree murder to be a constitutional right, without any evidence or examination whatsoever, with the death penalty the possible consequence of their decision being a mistake of law.

It now appears that, unless the Supreme Court can prove by evidence, beyond a doubt based on reason, that it has the Hitler-like power to decree mass murder to be a constitutional right, then Roe v Wade is just such a mistake of law.

CONCLUSION

Is government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

The evidence proffered herein would appear sufficient to permit reasonable people to conclude beyond a reasonable doubt that the Supreme Court of the United States has committed mass murder in the first degree. The evidence would appear sufficient for reasonable people to conclude that, upon a scale never seen before in the peacetime history

of the world, "The dagger of the assassin was concealed beneath the robe of the jurist." The Justice Case, 3 Trials of War Criminals Before The Nuernberg Military Tribunals 985(GPO 1951).

If the United States were being ruled over by a Tribunal of Murderers, holding office for life, nakedly decreeing mass murder to be a constitutional right, in open defiance of the evidence, and presuming to be blindly obeyed by all courts, executives, legislatures, and people whatever without question, regardless of the evidence, then surely it would be the most astounding event in the legal history of the human race.

Alan Ernest
Counsel

Supreme Court, U. S.
FILED
APR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA HARRIS, Secretary of Health, Education & Welfare, APPELLANT

v.

CORA McRAE, et al., APPELLEES

On Appeal from the United States District Court for the Eastern District of New York

---

On The Motion For Appointment Of Alan Ernest As Counsel, etc.,

PETITION FOR REHEARING

Alan Ernest
P.O. Box 2471
Washington, D.C. 20013
Counsel for Petitioner

PETITION FOR REHEARING

The petitioner respectfully moves the Court to vacate its denial of the MOTION FOR APPOINTMENT OF ALAN ERNEST AS COUNSEL FOR CHILDREN UNBORN AND BORN ALIVE entered March 24, 1980, and to grant the motion for the following reasons:

1. The victims being killed are not especially represented by counsel.

2. The movant has presented new evidence, not presented by the parties, to show that many of the killings that the Court asserted to legalize in its 1973 abortion decision, Roe v Wade, 410 US 113, are murder, and also violate the United States Constitution. This new evidence is manifestly unparalleled in the legal history of the United States.

3. The movant also, by incorporation by reference, presented new evidence, not presented by the parties, to show that Roe v Wade is based on false evidence. This evidence shows the victims being exterminated in violation of the United States Constitution and positive criminal statutes.

4. It can not be pretended that it is any longer the government of the United States - any government of Constitution and laws - wherein judges condemn millions of victims to death, and then refuse to allow counsel to represent the victims; and refuse to allow the evidence that it used to condemn the victims to death to be cross-examined; and refuse to allow new evidence to be presented on behalf of the victims to show that they are being exterminated in violation of the United States Constitution and positive criminal statutes.

Wherein petitioner prays that the Court will vacate its order, and grant the motion to appoint counsel for the victims.

Alan Ernest
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

Alan Ernest
Counsel for Petitioner

see

79

4

5

491